(1) Supreme Court, U.S.
FILED

No. 001053 DEC 26 2000

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In The

Supreme Court of the United States

JOHN F. SHEGA, M.D.,

Petitioner,

v.

LEWIS, D'AMATO, BRISBOIS & BISGAARD and DOUGLAS R. REYNOLDS, SOUTHERN CALIFORNIA PHYSICIANS INSURANCE EXCHANGE and PATRICIA GOGO,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of California

PETITION FOR WRIT OF CERTIORARI

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94 pp

ISSUES PRESENTED

1. Whether the California courts' bestowal of absolute immunity upon an insurer who intentionally and maliciously makes false reports to the National Data Practitioners' Bank about one of its insured-physicians conflicts with the Health Care Quality Improvement Act [("HCQIA") 42 U.S.C. §§ 11101 *et seq.*] which, at most, confers only *qualified* privilege upon insurers who make such reports "without knowledge of the falsity of the information contained in the report"?

2. Whether the California courts' admission and misuse of improperly-obtained Navy medical personnel files violates 10 U.S.C. § 1102(b)?*

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* All relevant statutes have been reprinted in the Appendix. (App. 54-64)

CORPORATE DISCLOSURE STATEMENT

The caption of the case in this Court contains the names of all parties to the proceedings in the California Supreme Court.

However, Respondent Southern California Physicians Insurance Exchange no longer exists as a viable entity. The successor entity, known as SCPIE Indemnity Company, has assumed any potential liability in (and therefore has a direct financial interest in the outcome of) this case. Respondent Lewis, D'Amato, Brisbois & Bisgaard is a privately-owned law partnership.

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner JOHN F. SHEGA, M.D. ("Dr. Shega" or "Petitioner") hereby petitions this Court for a writ of certiorari from an order of the California Supreme Court denying review of a written opinion of one of California's Courts of Appeal which purports to interpret and apply federal law to the conduct of a national insurance company and its retained counsel.

As a result of the California Supreme Court's order, the findings of a jury and the judgment of the trial court in the underlying matter have been reversed and the case remanded to the trial court with directions to enter a final judgment for Respondents Southern California Physicians Insurance Exchange and Patricia Gogo (collectively "SCPIE") and Lewis D'Amato, Brisbois & Bisgaard ("LDBB") and Douglas Reynolds ("Attorney Reynolds").

INTRODUCTION

Dr. Shega is a Board Certified physician. At all relevant times, Dr. Shega maintained professional liability insurance through Respondent SCPIE.

In 1996, SCPIE settled a professional malpractice action brought against DR. SHEGA by a former patient while the matter was on appeal. Although both SCPIE's policy of insurance [Joint Appendix ("JA") 3582] and

California's Business and Professions Code § 801(e)[1] prohibited SCPIE from entering into "a settlement without the written consent of the insured," it is undisputed that neither SCPIE nor the attorneys retained by SCPIE to defend Dr. Shega against the medical malpractice claim (Respondents Attorney Reynolds and LDBB) obtained DR. SHEGA's prior consent to the settlement. SCPIE's conduct in this case is consistent with its normal practice in similar cases throughout the United States.

SCPIE also submitted a report to the National Practitioners' Data Bank which damaged Dr. Shega's reputation by falsely stating the nature, severity and amount of the malpractice claims made by the patient. The evidence showed SCPIE acted maliciously in filing the libelous report to teach Dr. Shega a lesson for failing to settle the underlying malpractice action for a lesser amount before it came to trial.

After hearing nine weeks of evidence, a jury found SCPIE, Attorney Reynolds and LDBB knowingly and intentionally violated their obligations to Dr. Shega and trammeled his right to protect his professional reputation by settling the underlying matter with full knowledge of Dr. Shega's opposition to any settlement.

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[1] California Business & Professions Code § 801(e) provides as follows:

> Notwithstanding any other provision of law, no insurer shall enter into such a settlement without the written consent of the insured, except that this prohibition shall not void any settlement entered into without that written consent. The requirement of written consent can only be waived by both the insured and the insurer.

After being instructed that an insurer is only entitled to qualified immunity in connection with false reports to the National Practitioners' Data Bank, the jury imposed liability upon SCPIE for libel based on an express finding that the insurer had acted maliciously in overstating the amount of the settlement and nature of the underlying claims in its report concernign Dr. Shega.

The judgment entered against the Respondents on Petitioner's claims totaled $859,482 – including over $700,000 in compensatory and punitive damages attributable to the libel cause of action.

In its decision dated June 20, 2000, the California Court of Appeal (Fourth Appellate District, Division One) reversed the judgment entered on the jury's verdict based, in part, on its conclusion that SCPIE's report to the National Data Bank was "absolutely privileged" under federal law – thereby bestowing total immunity from liability upon SCPIE for its malicious conduct.

After his request for a rehearing was denied by the Court of Appeal, Dr. Shega sought review by the California Supreme Court of the intermediate appellate court's decision on the ground (among others) that the California Court of Appeal's decision barring claims against an insurer for making false reports to the National Data Bank conflicted with federal case law interpreting the Health Care Quality Improvement Act [("HCQIA") 42 U.S.C. §§ 11101 *et seq.*].

In support of his petition for review, Dr. Shega cited a letter to the Court of Appeal in which SCPIE conceded this case was the "first" of its kind because "no court has

previously held the [absolute] privilege applies to reports [to the National Practitioners' Data Bank] submitted by insurance companies."

The California Supreme Court declined to review the intermediate appellate court's decision, and the matter was returned to the trial court for entry of a final judgment in favor of Respondents.

FACTUAL BACKGROUND

As a result of the jury's verdicts in this case, the following facts were deemed conclusively established by the appellate court (App. 6-9):

In 1989, Dr. Shega was served with a medical malpractice claim (the "*Pardini* matter"). (App. 7) Petitioner tendered the defense of the matter to his insurance carrier, SCPIE. SCPIE retained LDBB to provide a defense for Dr. Shega in the action. (*Id.*)

During the course of the litigation, SCPIE repeatedly expressed its desire to settle the matter for the de minimis sums being demanded by the claimant, but Dr. Shega refused – insisting he had done nothing wrong in his treatment of the claimant. (RT 625, 629-630, 2203-2204; 12 JA 3366-3367) Dr. Shega explained to LDBB and his insurance company that any settlement with the claimant would damage his professional reputation because it would be viewed by the medical community as an admission of malpractice. (RT 956, 961, 963-964, 1233)

When the matter did not settle, SCPIE asked LDBB to assign the matter to an attorney in the office with which it

was more familiar – Attorney Reynolds. Reynolds, who took over Petitioner's defense shortly before the *Pardini* matter was scheduled for trial, made several mistakes in his handling of the matter. (App. 28) As a result, a $367,500 judgment was entered in favor of the claimant. (App. 7)

In the post-judgment motions filed by Attorney Reynolds on behalf of Petitioner, LDBB asserted the trial court made several legal errors during course of the *Pardini* trial which had "a devastating effect" on Dr. Shega's right to a "fair trial." (JA 1733, 1747-1748)

Dr. Shega, with encouragement from Attorney Reynolds and SCPIE's consent,[2] filed an appeal seeking review of the judgment. (JA 3404)

However, in the months following the judgment, SCPIE (which was not pleased with Dr. Shega for rejecting prior settlement offers) told Attorney Reynolds to negotiate a settlement with counsel for the claimant. (RT 911-913) These negotiations were not disclosed to (and, in fact, were actively concealed from) Petitioner by SCPIE, LDBB and Attorney Reynolds. (JA 124-125; RT 1536, 2191-2192, 2495, 3361-3368)

In July 1994, LDBB and Attorney Reynolds (upon instructions from SCPIE) allowed Dr. Shega's appeal in the *Pardini* matter to go into default. (RT 898, 900-901, 905, 1493-1495, 1505; JA 3411) Attorney Reynolds even wrote a letter to SCPIE acknowledging he did not have

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[2] In a letter to Dr. Shega dated May 28, 1995, Attorney Reynolds stated his "strong belief" that there were "good" grounds for an appeal in the *Pardini* case. (JA 3397-3398)

Dr. Shega's consent to negotiate a settlement. (App. 8) Shortly thereafter, SCPIE, LDBB and Attorney Reynolds (contrary to their specific contractual, ethical and statutory responsibilities) settled the case without Dr. Shega's knowledge or consent. (RT 926-927, 1528; 12 JA 3414-3417) The final written agreement was drafted and signed by Attorney Reynolds, purportedly on behalf of Petitioner, on August 19, 1992. (JA 3431-3433; RT 928-929)[3] All of these events and documents were concealed from Dr. Shega. (App. 9)

For a period of several months, SCPIE, LDBB and Attorney Reynolds actively concealed the fact that the settlement had been consummated against Dr. Shega's wishes, and misled Petitioner into believing that his appeal was still pending. (JA 125, 3418; RT 2185, 3362-3368)

During this time, SCPIE submitted a report to the National Data Bank which overstated the nature, severity and amount of the malpractice claims made against Dr. Shega in the *Pardini* matter.[4] (App. 4)

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[3] In addition to settling the judgment, the agreement purported to resolve non-existent "potential" wrongful death claims on behalf of the claimant's children. (RT 1528, 1552-1553) Neither the existence of this "claim," nor its "settlement," was known to Dr. Shega. (*Id.*)

[4] The report was inaccurate in several respects: First, the report indicated Petitioner had ***compromised*** a patient claim – thus, making it appear Dr. Shega had agreed to liability when, in fact, he was not even aware of the settlement. (RT 2604, 2611) Second, the report suggested a medical malpractice ***judgment*** in the sum of $450,000 had been entered against Petitioner – when, in fact, the judgment as reduced by the appellate court was approximately $250,000. (RT 2604, 2606) And finally, the report

In September 1992, Dr. Shega heard for the first time about SCPIE's settlement in the *Pardini* matter. (RT 929, 1490, 2186, 2208-2209) Petitioner repeated his objection to any settlement to both Attorney Reynolds and SCPIE. (RT 1543) Neither informed Dr. Shega the matter had already been settled. (JA 125) In fact, SCPIE deceived Dr. Shega into believing that a final decision with regard to his appeal and the settlement had not yet been made. (RT 1538-1543, 1672-1673, 2205-2206, 2500, 3436-3437)

More than two months after the settlement and submission of the National Data Bank report, SCPIE sent Dr. Shega a copy of the report. (RT 2208) As a result of the delay in notification, Dr. Shega was deprived of any opportunity to correct the misinformation in the report or otherwise submit additional information concerning the *Pardini* claim.

When Dr. Shega learned the *Pardini* matter had been settled without his permission and an inaccurate report had been sent to the Data Bank, he immediately complained to SCPIE. Dr. Shega also learned that as a result of the "size" of the settlement, SCPIE had (contrary to its previous promises) rejected his insurance renewal. (RT 2209-2210)

When Dr. Shega complained about these things and his personal attorney requested copies of his insurance files, SCPIE submitted a second inaccurate report directly to the California Medical Board. (RT 2497)

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was misleading in that it indicated that the underlying judgment involved the ***wrongful death*** of a patient. (RT 2611-2612)

PROCEDURAL HISTORY

Petitioner sued LDBB and Attorney Reynolds for legal malpractice and breach of fiduciary duty. (App. 4) In a separate action, Dr. Shega sued SCPIE for breach of contract, breach of the covenant of good faith and fair dealing, intentional misrepresentation, and defamation. (*Id.*) The two lawsuits were consolidated for trial. (*Id.*)

Shortly before trial, SCPIE cross-complained against Dr. Shega for fraud and recission of its policy of insurance based on allegedly false statement made by Dr. Shega in his insurance application concerning his performance as a physician in the United States Navy. (App. 23)

During the trial, SCPIE proffered information improperly obtained from Dr. Shega's Navy personnel files (allegedly to prove its fraud claim). (App. 25-26) By misconstruing the information, SCPIE was able to argue Dr. Shega was a bad doctor who provided materially false information on his insurance application. (*Id.*) Dr. Shega objected to the admission of any information from his Navy personnel file citing the state court to the federal privileges embodied in 10 U.S.C. § 1102(b). (App. 24-25) The trial court admitted these documents and records over Dr. Shega's objections. (*Id.*)

After a trial lasting over two months, a jury found in favor of Dr. Shega on most of his claims:

- The jury found against SCPIE for breach of contract, breach of the covenant of good faith and fair dealing, intentional misrepresentation, and defamation. (JA 2591-2619) The jury awarded both compensatory and punitive

damages against SCPIE totaling $856,635. (*Id.*)

- The jury found against LDBB and Attorney Reynolds on the legal malpractice claim. The trial court limited the issues upon which the jury could find liability and refused to allow the jury to consider an award of non-economic damages. Even so, the jury awarded economic damages to Petitioner in the sum of $2,847.00. (JA 2969-2970)

- The jury also rejected SCPIE's cross-action for fraud based on alleged material misrepresentations in Dr. Shega's insurance application. (JA 2608)

SCPIE appealed the trial court's judgment, arguing the following: (1) *insufficiency of the evidence* to support intentional misrepresentation, breach of contract, defamation, bad faith and punitive damages; (2) the trial court *abused its discretion* in excluding testimony; (3) SCPIE's defamatory reports to the Medical Board and National Data Bank were absolutely privileged *as a matter of law*; and (4) *insufficiency of the evidence* to support the jury's rejection of SCPIE's cross-action for fraud. (*Id.*)

LDBB argued *insufficiency of the evidence* to support the jury's award of damages for legal malpractice, and *abuse of discretion* in connection with the trial court's award of costs.

Dr. Shega cross-appealed the judgment entered against LDBB and Attorney Reynolds arguing (among other things) the trial court: (1) usurped his right to jury

trial on the issues of causation and damages; (2) improperly restricted the evidence proffered by Dr. Shega in support of his claims; and (3) erroneously rejected Dr. Shega's claim for noneconomic emotional distress damages.

Based on its review of the record, the California Court of Appeal concluded Dr. Shega's evidence of damages was legally insufficient to support any claim, except the defamation cause of action. (App. 10-19) As to Dr. Shega's claim for defamation, which could not be reversed for lack of damages (because the reports are *per se* libelous), the Court of Appeal held the insurance company's actions were absolutely privileged (App. 19-22)[5]

Dr. Shega requested rehearing based on numerous legal and factual errors in the Court of Appeal's decision – including mistakes in the California appellate court's application of federal law. (Rehearing Petition, pp. 9-10) The Petition for Rehearing was denied by the Court of Appeal.

Dr. Shega then sought review of the state intermediate appellate court's decision by the California Supreme Court. Dr. Shega argued (among other things) that the California Court of Appeal's application of an *absolute* privilege to an insurer's maliciously false reports to the National Data Bank conflicted with federal law [42 U.S.C.

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[5] Given its ruling on Respondents' appeal, the Court of Appeal rejected the arguments raised in Dr. Shega's cross-appeal. (App. 26-50)

§ 11137 and *Brown v. Presbyterian Health Care Service*, 101 F.3d 1324 (10th Cir. 1996)] which confers only *qualified* privilege upon authorized persons who make such reports "without knowledge of the falsity of the information contained in the report."

On September 27, 2000, the California Supreme Court denied review without opinion. (App. 53) On October 3, 2000, jurisdiction over this matter was returned to the trial court to enter judgment in accordance with the Court of Appeal's decision. (App. 52A) On or about November 3, 2000, SCPIE provided the trial court with a final judgment in the case.

BASIS FOR JURISDICTION

The petition for writ of certiorari is timely under 28 U.S.C. § 2801(c). The order of the California Supreme Court which Petitioner seeks to have reviewed was issued on September 27, 2000. (App. 53)

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a). This case involves two well-established bases for the invocation of certiorari: (1) the presence of a direct conflict between the decisions of the federal courts of appeals and that of the highest court of a state with regard to a federal question [*Andresen v. Maryland*, 427 U.S. 463, 470, fn. 5 (1976)]; and (2) important issues regarding the interpretation and application of a federal statute [*United States v. Ruzicka*, 329 U.S. 287 (1946)].

REASONS FOR GRANTING THE WRIT

I.

THE CALIFORNIA COURTS' CONCLUSION THAT AN INSURER'S COMMUNICATIONS WITH THE NATIONAL PRACTITIONERS' DATA BANK ARE ABSOLUTELY PRIVILEGED CONFLICTS WITH FEDERAL STATUTORY AND CASE AUTHORITY.

As noted above, the California Court of Appeal in this case held SCPIE's false report of the settlement to the National Practitioners' Data Bank pursuant to the Health Care Quality Improvement Act ("HCQIA") [42 U.S.C. §§ 11101 *et seq.*] was *absolutely* privileged – thereby bestowing unconditional immunity upon the insurer. (App. 19-22, 54-59)

DR. SHEGA submits the Court of Appeal's willingness to grant SCPIE blanket immunity from liability conflicts with federal law.

A. The California Courts' Application of Federal Law In This Case Is Inconsistent With Both the Express Wording of the Applicable Statutes and the Case Law Interpreting the Statutes' Meaning.

First, the California courts' interpretation of federal law directly conflicts with 42 U.S.C. §§ 11111(a)(2) and 11137(c), which only confer *qualified immunity* on a person who makes a report to the National Practitioners' Data Bank "without knowledge of the falsity of the information contained in the report." *See Brown v. Presbyterian Health Care Service*, 101 F.3d 1324, 1333 (10th Cir. 1996).

In *Brown v. Presbyterian Healthcare Services, supra,* the hospital terminated a doctor's clinical privileges based on her alleged breach of an agreement with the hospital, which provided she was to obtain appropriate consultation before treating certain patients. 101 F.3d at 1327-1328. The hospital's adverse action report to the National Practitioners' Data Bank reflected that the doctor's clinical privileges were terminated based on the doctor's "incompetence/malpractice/negligence." 101 F.3d at 1328. The doctor sued the hospital's administrator for libel, claiming the report of termination was false. *Id.* at 1327.

In response, the hospital's administrator argued (inter alia) that she was immune, as a matter of law under 42 U.S.C. § 11137(c), from liability for damages on the doctor's defamation claim. *Id.* at 1334. The Court of Appeals noted:

> The Health Care Quality Improvement Act confers immunity on any person who makes a report to the National Practitioner Data Bank "without knowledge of the falsity of the information contained in the report." 42 U.S.C. § 11137(c) (1994). Thus, immunity for reporting exists as a matter of law unless there is sufficient evidence for a jury to conclude the report was false and the reporting party knew it was false. *Id.* at 1334.

To determine whether the hospital's adverse action report was true, the court examined the record:

> Although the data bank report in this case listed the reason for Lincoln County Medical Center's disciplinary action as "negligence/incompetence/malpractice," the record reveals neither the review panel nor the hospital's Board of

> Trustees ever found Dr. Brown negligent, incompetent or guilty of malpractice. Rather, the review panel merely determined Dr. Brown breached her agreement to obtain appropriate consultation. Although the panel members were "concerned that [Dr. Brown] does not recognize complicated obstetrics or is reluctant to refer such cases," the panel "felt that Dr. Brown was competent to do uncomplicated obstetrics." *Id.*

Finally, the court examined the evidence indicating the adverse action report was false and that the reporting party knew of the report's falsity:

> Ms. Miller [the hospital administrator], who was involved in the preparation and review of the report, received a copy of the committee's written findings and was fully aware of the committee's conclusions and the Board of Trustee's action against Dr. Brown. Thus, the record contains sufficient evidence from which a reasonable jury could have concluded the data bank report was false and Ms. Miller knew of its falsity. We therefore affirm the district court's determination Ms. Miller is not immune from defamation damages, as a matter of law, under the Health Care Quality Improvement Act. *Id.*

The actions of Ms. Miller cited by the court in *Brown* are strikingly similar to the conduct of SCPIE and Respondent Gogo in this case.

In *Anbar v. Leahan*, 1998 U.S. Dist. LEXIS 8704 (E.D.Pa. 1998), a physician sued his professional liability insurer, Physicians Insurance Company, and its representatives, Leahan and Reed, for (among other things) defamation arising from inaccuracies in their report to the

National Practitioners' Data Bank of a medical malpractice entered into by the defendants on behalf of the physician by the insurer without the physician's consent.

The insurer and its representatives moved for summary judgment on the grounds the report was mostly true and, in any event, it was absolutely privileged under 42 U.S.C. § 11137(c). In denying the motion, the court recognized:

> [Although] . . . HCQIA includes a provision expressly proclaiming that there is no presumption that medical malpractice settlement payments are an admission of liability [42 U.S.C. § 11137(d), n]onetheless when the information – or misinformation – comes across the computer to those who are searching the Data Bank that one Dr. Anbar settled a medical malpractice claim against him for $200,000, one might reasonably draw the inference that the payment of that sum in that litigation context means that the payor was quite possibly a malpractitioner. *Id.* at *11 [footnote omitted].

The district court agreed with the doctor "that [the insurer's report] was only half true and thus, fatally false." *Id.*

> He personally paid nothing. . . . [Therefore], he asserts that his name should never have been placed in the Data Bank at all. But even so, the evidence suggests his designation [as the "payor"], as entered into the Data Bank, was less than true. *Id.*

The district court explained the settlement payment of "$200,000, although not a huge sum, is nevertheless

not pocket change, a mere nuisance fee to make a groundless suit go away." *Id.*

> If it turns out that statement as to Dr. Anbar's having been the *payor* of $ 200,000 was false, and that that sum was paid over his objection, then the clear defaming inference is that his medical dereliction becomes actionable: it tends to tell the reader that Dr. Anbar is one who negligently injures, or has injured, his patient or patients. That is the sort of inference that can tend to empty his reception room and diminish his future job prospects. *Id.*

As to the insurer's second point, the district court acknowledged "that the HCQIA provides immunity to one making such a report." *Id.*

> But that immunity is *not absolute*: section 11137(c) of the HCQIA states: "No person or entity . . . shall be held liable in any civil action with respect to any report made under this subchapter . . . without knowledge of the falsity of the information contained in the report." Id. [emphasis added]. Whether the [insurer had] such knowledge of falsity strikes me as a genuine jury question. *Id.* (emphasis added).

In this case, the report filed by SCPIE with the National Practitioners' Data Bank was likewise false. First, the report purported to confirm Petitioner had ***compromised*** a patient claim. Thus, the report made it appear Dr. Shega had agreed to liability when, in fact, he was not even aware of the settlement. (RT 2604, 2611)

Second, the report indicated a medical malpractice ***judgment*** in the sum of $450,000 had been entered against

Petitioner. The report overstated the amount of the judgment by approximately $200,000. (RT 2604, 2606)

And finally, the report was misleading in that it indicated that the underlying claim involved the ***wrongful death*** of a patient – a very serious charge against any doctor. (RT 2611-2612)

B. The California Courts' Interpretation of the Federal Statutes In this Case Is Also Inconsistent With Congress' Express Legislative Intent.

The Court of Appeal's attempt to bestow absolute immunity on SCPIE is also inconsistent with the primary purpose of the HCQIA which is to provide protection to participants in the medical peer review process. 42 U.S.C. §§ 11101(4) and (5). (App. 54)

As noted by the Sixth Circuit Court of Appeals in *Manion v. Evans*, 986 F.2d 1036, 1037 (6th Cir. 1993):

> The early 1980s witnessed a new trend in health care litigation as states and health care accrediting bodies stepped up their promotion of peer review – the process by which physicians judge the competence of their fellow professionals and recommend disciplinary action for those found dangerously incompetent. As this process gathered force, physicians aggrieved by the results of peer review increasingly appeared in federal court claiming that the actions of their peers were anti-competitive and violated federal antitrust laws. Although hospitals and peer review participants generally prevailed in these lawsuits, the victories entailed costly and time-consuming litigation. . . . [¶] Congress attempted to remedy this situation in 1986 by enacting the

Health Care Quality Improvement Act (HCQIA), 42 U.S.C. §§ 11101-11152.

The purpose of HCQIA is "[t]o encourage participation in the peer review process" by creating "a form of protection from liability in damages for hospitals and peer review participants." *Pfenninger v. Exempla, Inc.*, 116 F. Supp.2d 1184, 1198 (D.C.Co. 2000).

To protect the physician's due process rights, "the act has set up specific procedural safeguards which must be given to the doctor before the hospital and physician members of the peer review process are afforded the benefits of the immunity provisions." *Islami v. Covenant Medical Center*, 822 F.Supp. 1361, 1379 (D.C.N.D.Ia. 1992).[6] Under the provisions of the Act, persons and entities participating in peer review are entitled to qualified

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[6] For example, 42 U.S.C. § 11112(a) requires that the peer review action be taken

> (1) in the reasonable belief that the action was in the furtherance of quality health care,
>
> (2) after a reasonable effort to obtain the facts of the matter,
>
> (3) after adequate notice and hearing procedures are afforded to the physician involved or after such other procedures as are fair to the physician under the circumstances, and
>
> (4) in the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts and after meeting the requirement of paragraph (3).

Subsections 11112(b) and (c) outline the minimum requirements and procedures to be followed by hospitals in investigating charges, and noticing and conducting peer review hearings. See *Islami v. Covenant Medical Center*, supra, 822 F.Supp. at 1378.

immunity only if the standards set out in the Act have been satisfied. *Pfenninger v. Exempla, Inc., supra,* 116 F. Supp.2d at 1198-1199.

There is no such due process protection afforded the physician by insurance companies reporting to the National Practitioners' Data Bank. In fact, according to the California courts' rulings in this case, there is no requirement that the insurer use reasonable effort to obtain the facts; the insurer is not even required to have a reasonable belief that the report is accurate.

Although DR. SHEGA was afforded no prior notice of SCPIE's actions and an inadequate opportunity to refute and/or clarify the content of the reports before they were input in the Data Bank, the California courts have bestowed blanket immunity on all insurance companies who (for whatever purpose) file reports with the National Practitioners' Data Bank.[7]

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[7] Although the California courts' opinions are unpublished, it will have nationwide impact on the conduct of not only SCPIE, but upon all national insurance companies which underwrite professional liability insurance for physicians. By reversing the jury's verdict, the California Court of Appeal's decision grants immunity even to insurance companies which falsely and maliciously report to the National Practitioners' Data Bank any doctor who dares to place his/her professional reputation above the insurer's economic interests by refusing to settle.

II.

THE CALIFORNIA COURTS VIOLATED THE CONFIDENTIALITY OF MILITARY MEDICAL QUALITY ASSURANCE RECORDS MANDATED BY FEDERAL LAW.

As noted above, SCPIE filed a cross-complaint against Dr. Shega for fraud and recission of its policy of insurance based on allegedly false statements made by Dr. Shega in his insurance application.

During the trial, SCPIE proffered information improperly obtained from Dr. Shega's Navy medical personnel files. By misconstruing the information, SCPIE argued Dr. Shega had provided materially false information on his insurance application. The trial court admitted these documents and records over Dr. Shega's objections based on 10 U.S.C. § 1102(b) [App. 59-64]. (RT 24-25)

On appeal, DR. SHEGA raised the trial court's misuse of his medical personnel records to argue SCPIE was not prejudiced by any alleged errors with regard to the trial court's treatment of its cross-action for fraud. The California appellate court ignored Dr. Shega's objection to the misuse of his personnel records. In fact, the appellate court relied on and restated information from DR. SHEGA's improperly-obtained medical personnel files in support of its opinion. (App. 25-26)

As a result of the California courts' misuse and republication of Dr. Shega's Navy medical personnel records, their content has become a matter of public record – and thus, subject to possible further misapplication and abuse by SCPIE and others in the future.

DR. SHEGA submits the misuse of his Navy medical personnel records in the proceedings below clearly contradicts 10 U.S.C. § 1102(b), which not only prohibits the admission into evidence of these documents and information in any judicial proceeding, but also prevents any person from testifying at any judicial proceeding as to the content of these records or "with respect to any finding, recommendation, evaluation, opinion, or action taken . . . in connection with such record." (App. 59-64)

The purpose of the protection afforded to these documents is to preserve the confidentiality of all medical quality assurance activities. *In re United States*, 864 F.2d 1153, 1156 (5th Cir. 1989).

> [T]he overriding Congressional concern was to produce an effective mechanism allowing the military departments to monitor and ensure that quality medical care be provided to Department of Defense beneficiaries through a collegial review process operating in "an environment of confidentiality in order to elicit candid appraisals and evaluations of fellow professionals" without the fear that such records would be subject to discovery during litigation, thereby causing such beneficiaries to "receive less than the high quality of care they deserve." *Smith v. United States*, 193 F.R.D. 201, 208 (D.C.Del. 2000).

Under Section 1102(b), a court has "no discretion" to permit the use of such records. *In re United States, supra*, 864 F.2d at 1156. In fact, the privilege is considered so important that "[e]ven if an adverse party in litigation obtains a copy of a . . . record, the statute still prohibits its use in the case." Woodruff, *The Confidentiality of Medical*

Quality Assurance Records, The Army Lawyer (May 1987), p. 5. The privileged status bestowed upon Dr. Shega's Navy records cannot even be waived by their disclosure to other health care institutions. 10 U.S.C. § 1102(c)(D); *Smith v. United States, supra*, 193 F.R.D. at 207.

Dr. Shega submits the California courts violated federal law by admitting and using the documents. Section 1102(b) has been broadly applied to any "proceedings, records, minutes and reports" initiated for the "identification and prevention of medical or dental incidents and risks." 10 U.S.C. § 1102(j); *see Cole v. McNaughton*, 742 F.Supp. 587, 590-591 (D.C.W.D.Okla. 1990).

CONCLUSION

Based on the foregoing, Dr. Shega submits certiorari should be granted in this case to prevent the misinterpretation and misapplication of important federal privileges by the California courts. While the Court is normally loath to grant certiorari to review unpublished intermediate state court decisions, the Court's intervention in this case is warranted because of the impact of

California's approach on the practices on insurance companies throughout the country.

DATED: December 21, 2000

Respectfully submitted,

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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT
DIVISION ONE
STATE OF CALIFORNIA

JOHN F. SHEGA, Plaintiff and Appellant, v. LEWIS, D'AMATO, BRISBOIS & BISGAARD LLP et al., Defendants and Appellants;	)	D029700 (Super. Ct. No. 666185)
JOHN F. SHEGA, Plaintiff, Cross-defendant and Respondent, v. SOUTHERN CALIFORNIA PHYSICIANS INSURANCE EXCHANGE et al., Defendants, Cross-complainants and Appellants.	)	 (Super. Ct. No. 666735)

(Filed Jun. 19, 2000)

APPEALS from a judgment of the Superior Court of San Diego County, Anthony C. Joseph, Judge. Affirmed in part; reversed in part.

Defendants/cross-complainants Southern California Physicians Insurance Exchange[1] (SCPIE) and its claims supervisor Patricia S. Gogo (together Insurers) appeal the portion of a judgment after jury trial favoring plaintiff John F. Shega on Shega's second amended complaint for breach of contract, breach of the implied covenant of good faith and fair dealing, intentional misrepresentation and defamation. Insurers contend various components of the judgment on Shega's second amended complaint lacked substantial evidentiary support, the special verdict contained no findings against Gogo on Shega's intentional misrepresentation claim, and the court erroneously excluded evidence proffered by Insurers. Concluding Gogo was not liable for intentional misrepresentation, Insurers were immune from liability for defamation, and Shega did not prove SCPIE's misconduct caused him any damage, we reverse the portion of the judgment favoring Shega against Insurers on Shega's second amended complaint and direct the superior court to enter judgment favoring Insurers.

SCPIE also appeals the portion of the judgment favoring Shega on its cross-complaint for fraud and negligent misrepresentation. SCPIE contends the court should have concluded Shega was liable as a matter of law for assertedly concealing material facts in his insurance application. However, we affirm the portion of the judgment favoring Shega on SCPIE's cross-complaint.

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[1] SCPIE Indemnity Company is the successor in interest to Southern California Physicians Insurance Exchange.

Both plaintiff Shega and defendants Lewis, D'Amato, Brisbois & Bisgaard LLP (LDBB) and Douglas A. Reynolds (together Law Firm) appeal various components of the portion of the judgment favoring Shega against Law Firm on Shega's first amended complaint for legal malpractice and breach of fiduciary duty. Claiming entitlement to additional damages, Shega contends the trial court improperly limited the issues submitted to the jury and made various evidentiary and instructional errors. Law Firm attacks the damage award to Shega as devoid of substantial evidentiary support. We reverse in its entirety the portion of the judgment favoring Shega against Law Firm and direct the superior court to enter a new judgment favoring Law Firm.

I

INTRODUCTION

Physician Shega bought a $500,000 medical malpractice liability insurance policy from SCPIE. When patient Pardini sued Shega for medical malpractice (the Pardini case), SCPIE provided Shega's defense through Law Firm. After Shega rejected Law Firm's advice to accept Pardini's settlement offers, the Pardini case was tried to a jury. Ultimately, Pardini was awarded $367,502, an amount greater than any of Pardini's pretrial settlement offers. Law Firm approved the proposed judgment prepared by Pardini but did not reduce the verdict against Shega by $70,000 as required by Civil Code sections 1431.2 and 3333.2, subdivision (b).

Shega appealed the medical malpractice judgment favoring Pardini. However, contrary to Shega's directions

and without Shega's knowledge, Insurers and Law Firm proceeded to settle Pardini's claims against Shega for $450,000 while allowing dismissal of Shega's appeal.[2] Meanwhile, Insurers submitted a report to the National Practitioners Data Bank (Data Bank) containing various asserted inaccuracies about Pardini's malpractice claims against Shega. Upon learning of the Pardini case settlement and Insurers' assertedly inaccurate report to Data Bank, Shega complained to Insurers and threatened to sue. Insurers told Shega's representative they "didn't want or need Dr. Shega's consent." Insurers also submitted a second inaccurate report, this time to the Medical Board of California (Medical Board).

Shega then filed separate lawsuits against Law Firm and Insurers. At Law Firm's request, the two lawsuits were consolidated for trial. At the consolidated trial, the jury was instructed that the court had determined as a matter of law, and the jury must accept as conclusively proven, the facts that (1) Shega's appeal based on the record of the Pardini case would have resulted in affirmance of the verdict but reduction of the judgment by $70,000 under Civil Code sections 1431.2 and 3333.2, subdivision (b); and (2) SCPIE was required to obtain Shega's written consent before settling the Pardini case. The court also instructed the jury that reports submitted by Insurers

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[2] The $450,000 settlement amount consisted of $350,000 in satisfaction of Pardini's judgment and $100,000 to settle the Pardini children's potential wrongful death claims. The settlement also stated Shega did not admit any liability to Pardini.

to Medical Board and Data Bank were conditionally privileged.

By special verdict, the jury found that by negligently failing to have the Pardini judgment reduced, Law Firm caused Shega $2,847 economic damages. The jury also found Law Firm breached its fiduciary duty to Shega but no economic damages resulted.

Further, by special verdict the jury found SCPIE caused Shega $12,635 economic damages by breaching the parties' insurance contract; SCPIE breached the contract's implied covenant of good faith and fair dealing by settling the Pardini case without Shega's written consent, causing Shega $37,500 economic and noneconomic damages; SCPIE caused Shega $3,750 economic damages and $100,000 noneconomic damages by intentionally misrepresenting material facts to Shega; and Insurers caused or would cause Shega $2,750 damages by defaming Shega through submitting unfair/inaccurate reports to Medical Board and Data Bank. The jury also found for Shega on SCPIE's cross-compliant based on allegedly fraudulent statements made by Shega in his application to SCPIE for the insurance policy. Later, the jury awarded Shega $700,000 punitive damages against SCPIE on his intentional misrepresentation claim.

The trial court entered judgment on the special verdicts. Each party appeals portions of the judgment.

II

INSURERS' APPEAL

A

Portion of Judgment Against Insurers on Shega's Second Amended Complaint

Insurers have launched various attacks on the portion of the judgment favoring Shega on his second amended complaint. As we shall explain, that portion of the judgment must be reversed with directions to the superior court to enter a new judgment favoring Insurers.

1

Facts

For purposes of determining the propriety of the portion of the judgment against Insurers on Shega's second amended complaint, we state the facts and reasonable inferences in the light most favorable to Shega as respondent.

In 1986 Shega applied to SCPIE for a medical malpractice liability insurance policy. SCPIE proceeded to issue Shega a $500,000 policy providing in part that SCPIE would "not settle any claim or suit without having first obtained the written consent of the insured" (the Consent Clause). (See Bus. & Prof. Code,[3] § 801, former subd. (d).)[4]

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[3] All statutory references are to the Business and Professions Code unless otherwise specified.

[4] With respect to physicians' professional liability insurance, former subdivision (d) of section 801 provided in

In December 1989 Pardini sued Shega for medical malpractice. SCPIE retained Law Firm to provide a defense for Shega. During the Pardini case, SCPIE repeatedly stated its desire to settle but Shega did not want to do so. Hence, as recommended by SCPIE, in July 1991 Shega retained Attorney Schafer as his outside personal counsel to protect him against any liability to Pardini beyond policy limits. Meanwhile, insisting he had not committed medical malpractice, Shega rejected Law Firm's advice to agree to Pardini's settlement demands of $150,000 in July 1991 and $60,000 in January 1992. Shega told SCPIE that any settlement with Pardini would damage Shega's professional reputation.

In March 1992 the jury rendered a $367,502 verdict favoring Pardini against Shega. Shega opposed a posttrial settlement with Pardini out of concerns about its impact on his reputation. However, immediately after the Pardini jury verdict, SCPIE instructed Law Firm to negotiate a settlement with Pardini. Further, following entry of judgment favoring Pardini against Shega in April 1992, SCPIE entered into settlement negotiations with Pardini's counsel without disclosure to Shega.

In June 1992 upon Shega's insistence and SCPIE's authorization, Law Firm appealed Pardini's judgment against Shega. Meanwhile, SCPIE received a copy of Pardini's written settlement offer bud did not inform Shega.

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relevant part that "no insurer shall enter into a settlement without the written consent of the insured." Such language now appears in subdivision (e) of section 801.

On July 2, 1992, Law Firm through Reynolds asked SCPIE to make the Pardini settlement final because Reynolds lacked Shega's consent to negotiate a settlement. Between July 13 and 21, 1992, SCPIE settled the Pardini case without Shega's knowledge or consent. On July 17, 1992, SCPIE's Gogo notified Reynolds the settlement was resolved but did not tell Shega. Instead, on July 21, 1992, Gogo simply told Shega that Pardini had made some overtures/proposals about settling the case and that Gogo wanted to talk about them. At that time, Shega did not understand that the Pardini case was being resolved. Stating he would be happy to meet with Gogo, Shega set up an appointment with Gogo for a few days later, an appointment soon cancelled by Gogo and rescheduled for a month later. Also on July 21, 1992, Gogo told Shega's personal counsel Schafer that SCPIE had reached an agreement to resolve the Pardini case for $450,000 including the Pardini children's potential wrongful death claims and that Shega's appeal of the Pardini judgment would not be pursued. On July 22, 1992, SCPIE sent Schafer a letter indicating Pardini had agreed to accept $450,000 in satisfaction of the judgment pending final judicial approval of the minor's compromise of the potential wrongful death claims. However Schafer did not communicate such information to Shega. On July 24, 1992, Shega's appeal in the Pardini case was dismissed.

On August 19, 1992, purportedly on Shega's behalf, Law Firm signed the final written settlement agreement with Pardini. Pardini dismissed the medical malpractice action, filed satisfaction of judgment, and obtained court approval of the minor's compromise of the potential

wrongful death claims. However, for several months SCPIE concealed the settlement from Shega and misled him into believing his appeal was still pending.

On August 27, 1992, about a week after the written settlement agreement was signed, SCPIE's Gogo met with Shega but did not tell Shega that the Pardini case had been settled or that Shega's appeal rights were gone. Thus, misled by Gogo into believing SCPIE had not yet made a final decision, Shega urged Gogo to convince SCPIE to continue the appeal and not settle the case. Gogo told Shega she would see what she could do but also stated that settlement was a business decision SCPIE had an absolute right to make.

If Shega had known of SCPIE's intent to settle the Pardini matter after judgment, he would have sought advice and protection from his private counsel, would have demanded pursuit of his appeal in the Pardini case and would have filed suit to prevent a settlement with Pardini. However, by concealing the settlement from Shega, SCPIE effected a binding settlement it would not have otherwise been able to consummate.

2.

Shega's Claim of Intentional Misrepresentation

(a)

Defendant Gogo Was Not Liable for Intentional Misrepresentation

The judgment ultimately entered by the trial court awarded Shega $103,750 compensatory damages against

SCPIE's claims supervisor Gogo for intentional misrepresentation. However, the questions on the special verdict about intentional misrepresentation dealt only with SCPIE. Since the jury thus made no findings against Gogo on Shega's intentional misrepresentation claim, we conclude Gogo cannot be held liable on such claim.

Shega asks us to construe the jury's special verdict on his intentional misrepresentation claim to include Gogo because SCPIE's liability was based largely on Gogo's conduct, Insurers were collectively referred to as "SCPIE" during trial, the jury was instructed Shega was seeking damages from both SCPIE and Gogo for intentional misrepresentation, and the caption of the special verdict form involving intentional misrepresentation referred to Gogo. However, although acknowledging he drafted a verdict form applying to all defendants and objected unsuccessfully to the "disappearance of Gogo" from the Insurers-submitted verdict form used by the trial court referring only to SCPIE, Shega has not appealed the portion of the ultimate judgment subsuming the overruling of his objection. Hence, on this record the portion of the judgment favoring Shega against Gogo on Shega's claim for intentional misrepresentation must be reversed.

(b)

Judgment Against SCPIE for Intentional Misrepresentation Lacked Substantial Evidentiary Support

The Judgment awarded Shega $3,750 economic damages, $100,000 noneconomic damages and $700,000 punitive damages against SCPIE for intentional misrepresentation. Asserting there was no evidence to support the

economic damages sought and obtained by Shega, SCPIE contends as a matter of law it could not be held liable to Shega for intentional misrepresentation. We agree with SCPIE.

" 'Fraud is an intentional tort, the elements of which are (1) misrepresentation; (2) knowledge of falsity; (3) intent to defraud, i.e., to induce reliance; (4) justifiable reliance; and (5) resulting damage.' " (*Conrad v. Bank of America* (1996) 45 Cal.App.4th 133, 156.) "In order to establish a cause of action for fraud a plaintiff must plead and prove in full, factually and specifically, all of the elements of the cause of action." (*Ibid.*) Shega's claim for intentional misrepresentation was based upon SCPIE's alleged concealment of its intention/decision to settle the Pardini case rather than pursue Shega's appeal of the Pardini judgment. Undisputed evidence indicated the written settlement with Pardini expressly stated Shega did not admit any liability to Pardini. Further, as noted, in a ruling not challenged by Shega with respect to SCPIE, the trial court held as a matter of law that Shega's appeal based on the record of the Pardini case would have resulted in affirmance of the verdict favoring Pardini with a $70,000 reduction in the judgment amount. Thus, in essence, Shega was required to make a specific factual showing that the Pardini settlement with no admission of liability caused him more damage than would have resulted from the appellate affirmance of the Pardini judgment. (*Ibid.*) However, Shega has not done so.

SCPIE contends Shega failed to prove any element of his fraud cause of action for intentional misrepresentation. Specifically, SCPIE's appellate briefs contend SCPIE had no intent to defraud Shega; SCPIE did not conceal

from Shega its decision to settle the Pardini case but instead intended to have Law Firm inform Shega of SCPIE's settlement decision and manifested such asserted intent by telling Law Firm of SCPIE's decision with the understanding and reasonable belief that Law Firm would in turn tell Shega but, unbeknownst to SCPIE, Law Firm failed to do so; Shega was legally deemed to have imputed knowledge of the allegedly concealed settlement-related facts received by Shega's agent Reynolds in the scope of his agency even if Reynolds breached his professional duty by not communicating such information to Shega; SCPIE believed in good faith it had the right to settle the Pardini case after judgment without Shega's consent; and any misrepresentation by SCPIE did not cause Shega any damages whether economic or non-economic. Further, after oral argument, we requested and received additional briefing from the parties on whether notice of the Pardini settlement given by SCPIE to Shega's personal counsel Schafer should be imputed to Shega, a question answered affirmatively by SCPIE. However, concluding Shega did not present evidence sufficient to support a conclusion he suffered any damages specifically attributable to SCPIE's alleged intentional concealment of the Pardini settlement, we need not determine whether Shega proved the other material elements of his intentional misrepresentation claim.

"Misrepresentation, even maliciously committed, does not support a cause of action unless the plaintiff suffered consequential damages. [citations.] And the damages suffered must be referable to, and caused by, the fraud." (*Conrad v. Bank of America, supra,* 45 Cal.App.4th at p. 159.) Shega contends that by settling the Pardini case

without Shega's consent, SCPIE knowingly deprived Shega of his contractual and statutory right to protect his reputation as he wished, including making the decision to pursue appeal of the Pardini judgment and decline to settle. However, Shega has not identified any authority holding that, without more, the loss of the right to control settlement constitutes compensable economic harm. Instead, to meet his burden of proof with regard to causation, Shega was required to establish by substantial evidence and reasonable inferences that SCPIE's alleged misconduct caused Shega specific economic harm. (*Id.* at pp. 156, 159.) Thus, at trial Shega sought to meet such burden by claiming entitlement to economic damages from SCPIE on the theory that SCPIE's settling the Pardini case rather than pursuing an appeal of the Pardini judgment harmed Shega's reputation, resulted in unfair/inaccurate reports to Data Bank and Medical Board, and caused Shega to lose income by rendering him unable to bring a partner and attendant new patients into his medical practice. As we shall explain, on this record Shega failed to prove any causal relationship between SCPIE's alleged misconduct and those claimed economic damages.

The record contained ample evidence contradicting Shega's claim that the Pardini settlement effectuated through SCPIE's alleged fraud specifically caused him economic damage in an amount beyond the harm that would have resulted from appellate affirmance of the Pardini judgment. In particular, evidence indicated that a year before the Pardini case was settled, Shega's practice was suffering economic damage because doctors aware of Shega's treatment of Pardini had stopped referring

patients to Shega. Evidence also indicated that before SCPIE's alleged fraudulent conduct involving settlement of the Pardini case, Shega felt unable to bring a partner into his practice due to the controversy in the medical community about his treatment of Pardini. Further, evidence indicated that after an appellate affirmance of the Pardini judgment with only a $70,000 reduction, reports to Data Bank and Medical Board would still have been legally required. Nonetheless, Shega contends his damage claims involving harm to his reputation, SCPIE's submission of assertedly unfair/inaccurate reports to Data Bank and Medical Board, and his inability to increase his income by bringing a partner into his medical practice were supported by the testimony of his expert Snelson, Reynolds, and Shega himself. However, Shega has not identified anything in such testimony expressly indicating, or otherwise raising a reasonable inference, that settlement of the Pardini case specifically caused Shega any damage that would not have resulted in any event from appellate affirmance of the Pardini judgment.

Contrary to Shega's counsel's characterization at oral argument, the testimony of Shega's expert Snelson contained nothing supporting a conclusion that settlement of the Pardini case harmed Shega more than would appellate affirmance of the Pardini judgment. Instead, Snelson simply testified that the $450,000 sum reported by SCPIE to Medical Board "seems like a very significant settlement. And the fact of its existence suggests that Dr. Shega went along with this." Moreover, other testimony by Snelson contradicted Shega's theory that settlement was more harmful than appellate affirmance. Specifically, Snelson testified a report to Data Bank was required upon

the payment of either a settlement or a judgment in connection with a medical malpractice claim. Thus, in the same vein, Snelson testified that once the Pardini judgment had been affirmed on appeal and payment was made, SCPIE would have been required to report the payment to Data Bank. Similarly, Snelson testified a report to Medical Board was required for a payment exceeding $30,000 on either a settlement or a judgment.

Reynolds testified it was not uncommon for physicians to refuse to consent to settlements and one reason for such hesitancy was doctors' perception that "agreeing to a settlement" could "be seen as an admission of liability or responsibility on their part." However, Shega has not identified anything in Reynold's testimony suggesting the medical community would view the settlement with Pardini more unfavorably than appellate affirmance of the Pardini judgment. Indeed, on the contrary, Reynolds testified "the problems with the reputation usually [have] to do with the filing of the lawsuit or losing it in court more than, more than settlement."

Shega testified he deemed his appeal of the Pardini judgment to be "most important" because he believed settling the Pardini case would indicate Shega had "maybe" done something wrong in excising Pardini's cancer and cause interested potential partners not to join into a partnership with Shega. In the same vein, Shega testified that by settling with Pardini, SCPIE rendered Shega unable to bring a partner and attendant new patients into his medical practice; in 1992 Shega could have sold a half interest in his practice for about $500,000; and after such sale Shega's revenue would have increased by about $200,000 to $300,000. However, Shega has not

identified anything in his own testimony supporting a conclusion that settlement of the Pardini case specifically caused him more harm than would have resulted from appellate affirmance of the Pardini judgment. Indeed, on the contrary, Shega testified he felt unable to seek a partner when Pardini claimed Shega had done "something wrong," he did not take on a partner because the Pardini matter was "pending" against him, and the Pardini judgment placed him in an "unfavorable light" making it difficult for him to bring in a partner.

In essence, Shega's claim the Pardini settlement caused him economic damage rested on the unstated premise that pursuit of the appeal of the Pardini judgment would have vindicated Shega, an untenable theory in light of the trial court's unassailable legal conclusion that on appeal the Pardini judgment would be reduced by $70,000 but otherwise affirmed. Thus, absent any demonstrated factual basis for concluding the Pardini settlement was more harmful than appellate affirmance of the Pardini judgment, Shega's mere opinion he was damaged by such settlement did not constitute substantial evidence to support an award of economic damages. (Cf. *Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 651.)

In sum, SCPIE obtained a postjudgment settlement of the Pardini case expressly indicating Shega admitted no liability to Pardini. The settlement completely insulated Shega from any liability arising from his treatment of Pardini. Specifically, SCPIE's payment of $450,000 to resolve the Pardini case and the related potential wrongful death claims of the Pardini children protected Shega from ever having to pay any money directly as a result of his treatment of Pardini. Shega presented no evidence

sufficient to support a conclusion he suffered any specific damage caused by such settlement apart from the harm that would have resulted in any event from appellate affirmance of the Pardini judgment. Stated otherwise, Shega did not establish that by settling the Pardini case without Shega's consent and thus depriving Shega of his statutory and contractual right to protect his professional reputation as he saw fit, SCPIE caused any incremental damage to Shega's reputation or business beyond that caused by an affirmed (though modified) Pardini judgment itself. (*McLaughlin v. National Union Fire Ins. Co.* (1994) 23 Cal.App.4th 1132, 1157; see *Western Polymer Technology, Inc. v. Reliance Ins. Co.* (1995) 32 Cal.App.4th 14, 27.)

Hence, since Shega failed to prove he suffered any specific economic damages caused by SCPIE's alleged fraudulent concealment of the settlement with Pardini, the award to Shega of $3,750 economic damages on his claim against SCPIE for intentional misrepresentation was improper. Further, since Shega did not prove SCPIE's intentional misrepresentation caused him any economic damages, Shega was not entitled to noneconomic damages for his asserted emotional distress on such claim. (*William v. Wraxall* (1995) 33 Cal.App.4th 120, 134, fn. 12.) Thus, the award to Shega of $100,000 noneconomic damages on his intentional misrepresentation claim cannot be sustained. (*Ibid.*) Additionally, as unsupported by compensatory damages, the award to Shega of $700,000 punitive damages on such claim must also fail. Accordingly, the portion of the judgment favoring Shega against SCPIE

on his claim for intentional misrepresentation must be reversed.[5]

3

Judgment Favoring Shega against SCPIE for Breach of Contract Lacked Substantial Evidentiary Support

The judgment awarded Shega $12,635 economic damages against SCPIE for breaching the Consent Clause of the parties' insurance contract by settling the Pardini case without Shega's consent. However, as discussed with respect to Shega's claim for intentional misrepresentation involving effectuation of the Pardini settlement, the record did not contain evidence sufficient to support a conclusion that such settlement caused Shega any specific damages beyond those that would have resulted from appellate affirmance of the Pardini judgment. Hence, Shega failed to prove any causal relationship between SCPIE's alleged breach of contract and Shega's claimed economic damages. Accordingly, the portion of the judgment favoring Shea against SCPIE on his claim for breach of contract must be reversed.

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[5] In light of our conclusion the portion of the judgment against SCPIE for intentional misrepresentation must be reversed for Shega's failure to present substantial evidence establishing the damage element of such claim, we need not reach SCPIE's contention the trial court prejudicially erred in excluding the testimony of Shega's medical assistant Smith.

Judgment Against SCPIE for Breach of Implied Covenant of Good Faith and Fair Dealing Lacked Substantial Evidentiary Support

The judgment awarded Shega $37,500 economic and noneconomic damages against SCPIE for breaching the insurance contract's implied covenant of good faith and fair dealing by settling the Pardini case without Shega's written consent. However, as discussed with respect to Shega's claims for intentional misrepresentation and breach of contract involving effectuation of the Pardini settlement, the record did not contain evidence sufficient to support a conclusion such settlement caused Shega any damages beyond those that would have resulted from appellate affirmance of the Pardini judgment. Hence, Shega failed to prove any causal relationship between SCPIE's alleged breach of the implied covenant and Shega's claimed economic damages. Further, " . . . a claim for emotional distress in a bad faith action cannot stand alone, but must be accompanied by some showing of economic loss." (*Continental Ins. Co. v. Superior Court* (1995) 37 Cal.App.4th 69, 85.) Thus, since Shega suffered no economic damages caused by SCPIE's alleged breach of the implied covenant, Shega was not entitled to recover emotional distress damages on such claim. (*Ibid.*) Accordingly, the portion of the judgment favoring Shega against SCPIE on his claim for breach of the implied covenant of good faith and fair dealing must be reversed.

Insurers Were Immune from Liability for Defamation

With respect to Shega's claim for defamation, the jury specially found Insurers caused or would cause Shega $2,750 damages by their publication to Medical Board

and Data Bank of reports that were not fair and accurate. Attacking that finding, Insurers contend the trial court should have determined their submission of such legally mandated reports to Medical Board (§§ 801, subd. (b), 803, subd. (b)) and Data Bank (42 U.S.C. § 11131) were absolutely privileged under Civil Code section 47, subdivision (b). We agree Insurers were statutorily immune from liability to Shega for defamation.

According to Shega, the reports Insurers submitted to Medical Board and Data Bank overstated the nature, severity and amount of the malpractice claims made against Shega in the Pardini case. At trial Insurers asserted they were protected by absolute statutory privileges from any monetary liability or cause of action for damages based on their reports to Medical Board and Data Bank. (Civ. Code, § 47, subd. (b).) Determining the reports were privileged only if made without malice, the trial court instructed the jury that such privilege was conditional.

Under Civil Code section 47, subdivision (b), subject to exceptions not applicable here, a publication or broadcast is privileged if made "[i]n any (1) legislative proceeding, (2) judicial proceeding, (3) in any other official proceeding authorized by law, or (4) in the initiation or course of any other proceeding authorized by law and reviewable" by mandate. "The privilege conferred by this section is absolute and is unaffected by the existence of malice." (*Dorn v. Mendelzon* (1987) 196 Cal.App.3d 933, 941.) The statute's phrase "in any other official proceeding authorized by law" has been judicially interpreted "to encompass 'those proceedings which resemble judicial and legislative proceedings, such as transactions of

administrative boards and quasi-judicial and quasi-legislative proceedings.' [Citation.] Three primary factors determine the nature of these proceedings: (1) whether the administrative body is vested with discretion based upon investigation and consideration of evidentiary facts, (2) whether it is entitled to hold hearings and decide the issue by the application of rules of law to the ascertained facts and (3) whether its power affects the personal or property rights of private persons." (*Prevost v. First Western Bank* (1987) 193 Cal.App.3d 1492, 1498.) Further, "[t]he 'official proceeding' privilege has been interpreted broadly to protect communications to or from *governmental* officials which may precede the initiation of formal proceedings." (*Slaughter v. Friedman* (1982) 32 Cal.3d 149 156.)

The Medical Board was formerly known as the Board of Medical Quality Assurance (BMQA). (See § 2002.) In *Dorn v. Mendelzon, supra,* 196 Cal.App.3d 933, the appellate court observed: "BMQA is an administrative agency created by the Legislature whose responsibilities include enforcement of the Medical Practice Act and review of the performance of physicians and surgeons licensed in California. [Citations.] It is an agency analogous to the State Bar of California, with the duty to investigate complaints and the power to initiate disciplinary proceedings against practitioners. [Citations.] Disciplinary actions taken against a licensee are reviewable by application for writ of mandate. [Citations.] Accordingly, any publication in connection with BMQA proceedings is clothed with the absolute privilege set forth in section 47(2) [(now Civ. Code, § 47, subd. (b))], as having been made in the course of an 'official proceeding' [citation] and proceedings

reviewable by writ of mandate [citations]. [¶] Furthermore, letters of communications designed to *prompt* official action are as much a part of an 'official proceeding' as a communication made after the proceeding has commenced."

(*Id.* at p. 941; see *Long v. Pinto* (1981) 126 Cal.App.3d 946, 948-951.)

In *Joel v. Valley Surgical Center* (1998) 68 Cal.App.4th 360, the appellate court concluded that required reports submitted to Medical Board and Data Bank by a health care facility/clinic (§ 805; 42 U.S.C. § 11133, 45 C.F.R. § 60.5(c) (1997)) were absolutely privileged under Civil Code section 47. (*Joel v. Valley Surgical Center, supra,* at pp. 371-372.) As a communication to a regulatory body, Insurers' required reports to Medical Board and Data Bank were similarly absolutely privileged under Civil Code section 47, subdivision (b). (*Joel v. Valley Surgical Center, supra,* at pp. 371-372; *Dorn v. Mendelzon, supra,* 196 Cal.App.3d at pp. 941-943; *Long v. Pinto, supra,* 126 Cal.App.3d pp. 948-951.)[6] Accordingly, the portion of the judgment favoring Shega against Insurers on his defamation claim must be reversed.

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[6] In light of our conclusion that Shega's defamation claim against Insurers was barred by the absolute privilege of Civil Code section 47, subdivision (b), we need not reach Insurers' contention, raised for the first time on appeal, that their reports were also absolutely privileged under Civil Code section 43.3 (See *Johnson v. Superior Court* (1994) 25 Cal.App.4th 1564, 1569.)

Conclusion on Shega's Second Amended Complaint Against Insurers

The portion of the judgment favoring Shega against Insurers on his second amended complaint must be reversed in its entirety and a new judgment entered in Insurers' favor.

B

Portion of Judgment Favoring Shega on SCPIE's Cross-complaint

On SCPIE's cross-complaint for fraud and negligent misrepresentation based upon allegedly material false statements made on Shega's application to SCPIE for insurance, the jury found for Shega. Seeking reversal, SCPIE contends the court should have held Shega liable on the cross-complaint because the false answers on Shega's insurance application were assertedly material as a matter of law as given in response to specific questions on the application seeking information critical to SCPIE's assessment of the risk of insuring Shega. However, on this record SCPIE has not demonstrated reversible error with respect to the jury's verdict favoring Shega on its cross-complaint.

The insurance contract issued by SCPIE to Shega provided that SCPIE was providing coverage "in reliance upon the statements and representations in the applications for insurance . . . made a part hereof. . . . " The contract also provided that by accepting the policy Shega agreed that "statements and representations" in his application constituted his "agreements and representations"

and that the policy was "issued in reliance upon the truth of such representations. . . . "

SCPIE's cross-complaint alleged Shega made false statements in his insurance application involving the United States Navy's previous investigation and discipline of Shega. The trial court denied SCPIE's motion to instruct the jury that the allegedly false statements in Shega's insurance application were material as a matter of law. Instead, the court submitted the issue of the statements' materiality to the jury. With respect to SCPIE's cross-complaint, the jury specially found Shega gave false answers to questions on his insurance application asking (1) if Shega's privileges had ever been reduced, restricted, preceptored or suspended and (2) if Shega had ever been investigated by any governmental agency. However, the jury also found such false representations were not material. Thus Shega obtained judgment on SCPIE's cross-complaint.

The materiality of a misrepresentation by an applicant for insurance "is determined solely by the probable and reasonable effect which truthful answers would have had upon the insurer." (*Thompson v. Occidental Life Ins. Co.* (1973) 9 Cal.3d 904, 916; *Burns v. Prudential Ins. Co.* (1962) 201 Cal.App.2d 868, 871.) Generally, the issue of the materiality of undisclosed information is a question for the trier of fact. (*CNA Casualty of California v. Seaboard Surety Co.* (1986) 176 Cal.App.3d 598, 615; *Martin v. Mutual Benefit etc. Assn.* (1945) 71 Cal.App.2d 557, 564.) Materiality is an issue of law only where undisputed facts show that reasonable minds could not differ, a situation not present here. (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 977.) Further, contrary to SCPIE's

contention, the fact it demanded answers to specific questions in the insurance application did not by itself necessarily establish materiality as a matter of law. (*Thompson v. Occidental Life Ins. Co., supra,* at p. 916.) Here, substantial evidence and reasonable inferences supported the jury's finding that Shega's misrepresentations on his insurance application were not material. (*CNA Casualty of California v. Seaboard Surety Co., supra,* at pp. 615-616; *Rutherford v. Prudential Ins. Co.* (1965) 234 Cal.App.2d 719, 732-733.)

Although the record contained evidence indicating that Shega's privileges had been suspended and restricted and that the Navy had investigated Shega for disobeying a commanding officer's order not to perform a certain surgical procedure, the jury could properly discount the weight of such evidence in light of contrary evidence presented by Shega. (*Thompson v. Occidental Life Ins. Co., supra,* 9 Cal.3d at p. 916; *Martin v. Mutual Benefit etc. Assn., supra,* 71 Cal.App.2d at p. 564.) Specifically, Shega presented evidence explaining why he made the false statements on his application: While in the Navy, Shega had been falsely accused of contradicting an order not to perform certain procedures on Navy patients and had not been allowed to perform additional procedures until cleared of the charges; Shega assumed he had never been "suspended" since any such "suspension" of his privileges by the Navy would have required a formal credentialing hearing but none ever occurred; and the Navy later acknowledged that it had erred in "suspending" Shega's privileges and that upon discovering such error the Navy had reinstated Shega's privileges retroactively to ensure Shega received his full pay. Further,

Shega's expert witness testified SCPIE had not produced any underwriting materials indicating it would not have issued the policy to Shega even if it had known the true facts. "[A]s the misrepresentation must be a material one, 'An incorrect answer on an insurance application does not give rise to [actionable] fraud, where the true facts, if known, would not have made the contract less desirable to the insurer. [Citations.]' [Citations.] And the trier of fact is not required to believe the 'post mortem' testimony of an insurer's agents that insurance would have been refused had the true facts been disclosed." (*Thompson v. Occidental Life Ins. Co., supra,* at p. 916.)

In sum, on this record the jury could reasonably conclude SCPIE did not show that truthful answers on Shega's applications would probably have resulted in SCPIE's declining to issue the policy to Shega and thus SCPIE did not meet its burden to prove materiality for purposes of its cross-complaint's claims for fraud and negligent misrepresentation. (*Holz Rubber Co., Inc. v. American Star Ins. Co.* (1975) 14 Cal.3d 45, 61; *Burns v. Prudential Ins. Co., supra,* 201 Cal.App.2d at p. 872; *Olson v. Standard Marine Ins. Co.* (1952) 109 Cal.App.2d 130, 137.) Hence, the portion of the judgment favoring Shega on SCPIE's cross-complaint must be affirmed.

III

SHEGA'S APPEAL

A

Law Firm's Motion to Dismiss Shega's Appeal

Law Firm seeks dismissal of Shega's appeal as allegedly untimely. Specifically, asserting we should treat

the single judgment entered in these two cases consolidated for trial as severable and thus effectively two separate judgments, Law Firm contends Shega's appeal was not filed within the time limitations of California Rules of Court,[7] rules 2(a) and 3(a).

On August 14, 1997, the court entered a single judgment on Shega's claims against Law Firm and Insurers. On August 19, 1997, Shega served all parties with notice of entry of judgment. Hence, under rule 2(a), Shega had 60 days to file an appeal, to wit, until October 20, 1997. However, on September 2, 1997, Shega filed a motion for new trial ultimately denied by the court on September 30, 1997. Thus, under rule 3(a), Shega's filing deadline was extended by 30 days to October 30, 1997. Meanwhile, on October 14, 1997, Insurers appealed the judgment. On November 3, 1997, Shega filed his appeal.

Law Firm contends Shega's appeal was untimely as filed four days after the October 30, 1997, deadline under rules 2(a) and 3(a). However, under rule 3(c), Shega's appeal was timely as filed within 20 days after Insurers' appeal. Although the court might properly have entered separate judgments in the two consolidated cases, it declined to do so. Thus, the fact remains there was only one single judgment. When Insurers appealed from that single judgment, the deadline for Shega to appeal such judgment was extended by 20 days. Since Shega filed his appeal before such deadline, his appeal is timely. Accordingly, Law Firm's motion to dismiss Shega's appeal must be denied.

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[7] All rule references are to the California Rules of Court.

B

Trial Court Properly Determined Pardini's Judgment Would Have Been Affirmed on Appeal

The trial court bifurcated for precedence the causation/damages issue whether Shega was damaged by the forfeiture of his appeal rights in the Pardini case. The court concluded the issue whether Shega would have prevailed on an appeal from the Pardini judgment was a question of law for the court's determination before the jury decided the remaining issues on Shega's claims against Law Firm. At the court's direction, Shega and Law Firm briefed available appellate issues in the Pardini case.

Ultimately, the trial court issued an opinion that on appeal the amount of the Pardini judgment would have been modified by $70,000 as "erroneously calculated" but otherwise "no prejudicial error occurred" that would have required reversal in the Pardini case. In accord with its opinion, the court instructed the jury: "The court has determined as a matter of law that an appeal based on the record of the underlying [Pardini]case would have affirmed the verdict, but modified the judgment reducing it by $70,000. You must accept this fact as conclusively proven."

1

Whether Shega's Appeal of Pardini's Judgment Would Have Succeeded Was Question of Law

Asserting the elements of causation and damages of his claim against Law Firm for legal malpractice raised

questions of fact for the jury, Shega contends the trial court committed reversible error per se by impermissibly usurping Shega's right to have a jury determine whether Shega suffered any damage as the result of the dismissal of Shega's appeal in the Pardini case. However, the issue whether Shega would have prevailed on appeal of the Pardini judgment was a question of law for judicial determination. (*Kurinij v. Hanna & Morton* (1997) 55 Cal.App.4th 853, 365;[8] *Croce v. Sanchez* (1967) 256 Cal.App.2d 680, 683;[9] *Pete v. Henderson* (1957) 155 Cal.App.2d 772, 776; *Pete v. Henderson* (1954) 124 Cal.App.2d 487, 490-492; cf. *Martin v. Hall* (1971) 20 Cal.App.3d 414, 420.) Indeed, by its very nature, with narrow exceptions not applicable here, determination of the merits of an appeal involves only issues of law. "The function of an appellate court is to review *errors of law* and not to pass on questions of fact." (9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 316, p. 354; see *id.*, § 361, p. 412.)

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[8] In *Kurinij v. Hanna & Morton, supra*, 55 Cal.App.4th 853, the appellate court stated: "The issue presented to the trial court was whether an appeal of these issues would have been successful. In determining that issue, the trial court addressed the subject as though it were sitting as a Court of Appeal. The parties must address and argue the issues as if they were addressing the Court of Appeal. In this context there are legal concepts peculiar to appellate law which must be considered." (*Id.* at p. 865.)

[9] "The record establishes no error of the judge at the trial in proceeding first on the legal issue whether an appeal of her original case . . . would have resulted in a reversal of the judgment. This issue was one which could not be submitted to a jury. . . . " (*Croce v. Sanchez, supra*, 256 Cal.App.2d at p. 683.)

2

Pardini's Judgment Would Have Been Affirmed on Appeal with Modification

We independently review the trial court's determination of questions of law. (*Hill v. City of Long Beach* (1995) 33 Cal.App.4th 1684, 1687; *Dawson v. East Side Union High School Dist.* (1994) 28 Cal.App.4th 998, 1041.) In conducting such independent review, we are mindful of legal concepts "peculiar" to appellate law: "One of the essential rules of appellate law is that '[a] judgment or order of a lower court is presumed to be correct on appeal, and all intendments and presumptions are indulged in favor of its correctness. [Citations.]' [Citation.] It is the duty of the appellant to present an adequate record to the court from which prejudicial error is shown. [Citation.] Also, the appellant must present argument and authorities on each point to which error is asserted, or else the issue is waived." (*Kurinij v. Hanna & Morton, supra,* 55 Cal.App.4th at p. 865.)[10]

Shega contends the trial court erred in concluding as a matter of law that Shega would not have prevailed on appeal of the Pardini judgment. Specifically, Shega contends the trial court here did not properly analyze (1) the

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[10] As if they were arguing to the Court of Appeal, the parties in Shega's consolidated lawsuits against Law Firm and Insurers each submitted to the trial court an "appellate brief "arguing the available appellate issues in the Pardini case ("Pardini appellate brief[s]"). (*Kurinij v. Hanna & Morton, supra,* 55 Cal.App.4th at p. 865.) The record before us contains those "Pardini appellate briefs." This record also contains reporter's transcripts from the Pardini case. Further, the record contains copies of documents filed in the Pardini case.

assertedly numerous ambiguities and inconsistencies in the jury's verdict in the Pardini case; and (2) the assertedly improper evidence admitted in the Pardini case bearing on Shega's reputation and custom/habit and on Shega's certification as a dermatology specialist.[11] However, on this record Shega has not demonstrated any prejudicial error with respect to the trial court's conclusion about the outcome of an appeal in the Pardini case.

(a)

Ambiguities and Inconsistencies in Pardini Case Jury Verdict

(i)

The Record in the Pardini Case

Plaintiffs in the Pardini case were Alan Pardini (Alan) and his wife Kathy Pardini (Kathy). The Pardini case was submitted to the jury with directions to return a verdict on various special issues and to return a general verdict as to Kathy.[12]

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[11] Although in the trial court Shega argued additional grounds for an appellate reversal of the Pardini judgment, Shega's opening brief here raises only the grounds specified above involving the form of the Pardini case jury verdict and the admission of certain evidence in the Pardini case. We address only those issues raised in Shega's opening brief here. (*Tiernan v. Trustees of Cal. State University & Colleges* (1982) 33 Cal.3d 211, 216, fn. 4; *Null v. City of Los Angeles* (1988) 206 Cal.App.3d 1528, 1533.)

[12] On March 4, 1992, about 8:50 a.m., soon before the jury in the Pardini case was to return to court for further deliberations, Pardini's counsel told the court clerk that the special verdict form submitted to the jury had omitted reference to Kathy's

The jury in the Pardini case found by special verdict that as a result of Shega's negligent care and treatment of Alan, "plaintiffs" suffered and would suffer damage for pain, suffering, inconvenience, physical impairment or disfigurement, emotional distress and anxiety both past ($300,000) and future ($100,000). The jury also specially found that although Alan was negligent, Alan's negligence did not contribute as a legal cause to Alan's injury. However, the jury further found specially that the percentages of the total negligence that proximately caused Alan's damages were 10 percent (Alan's contributory negligence), 65 percent (Shega's negligence), and 25 percent (Dr. Smith's negligence).[13] By general verdict, the jury found for Kathy on her loss of consortium claim

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separate claim. The clerk told Pardini's counsel the jury would resume deliberations at 9:30 a.m. and the clerk would inform the court of the situation. Pardini's counsel said he would contact Shega's counsel Reynolds and send the court a revised special verdict form. At 9:30 a.m. the jury resumed deliberations. At 10:20 a.m., when asked by the court whether counsel had submitted the revised special verdict form, the clerk said not yet. The court stated it would dictate a verdict form to the secretary for submission to the jury. At 11:25 a.m. the clerk received a revised special verdict form from counsel's office by messenger. At the court's direction, the clerk gave both counsel the following message by phone: "Court sent in separate general verdicts for the plaintiff [sic] wife. Jury has been deliberating nearly 3 hours. I believe to withdraw the verdict forms now and send in the new amended special verdict will be confusing to the jury." Apparently neither party objected to the court's submission of the general verdict form to the jury.

[13] According to Shega, at some point Alan consulted Dr. Smith, an ENT physician to check Alan's lymph nodes but medical records indicated Dr. Smith did not perform a complete head and neck evaluation at that time.

against Shega and awarded $100,000 damages to date and $30,000 future damages. Upon inquiry by the court, the presiding juror stated in open court that the damages awarded to Kathy were intended to be separate from those awarded to Alan. The court then polled the jurors whether the general verdict's damage award to Kathy was their verdict. The jurors unanimously said yes. Neither party's counsel requested further instruction, deliberation or polling of the jury.

Noting the jury had found Alan's 10 percent negligence was not a legal cause of injury to Alan, the Pardini trial court entered judgment redistributing such amount proportionately by increasing the percentages of negligence attributed to Dr. Smith (3 percent increase to 28 percent) and Shega (7 percent increase to 72 percent). The court then entered judgment favoring Alan for $250,000 ($187,500 past & $62,500 future) and Kathy for $93,600 ($72,000 past & $21,600 future) plus $23,902 costs.

(ii)

Analysis of Verdict Form in Pardini Case

Shega contends the Pardini trial court committed various errors probably affecting the outcome of the Pardini trial since the jury verdicts involved nine to three votes on crucial questions bearing on damages. Specifically, in his "Pardini appellate brief" submitted to the trial court here, Shega asserted (1) the Pardini trial court's use of a general verdict form confused the jury and was contrary to law; (2) the general verdict form drafted by the Pardini trial court was unduly suggestive of an outcome; (3) such general verdict form did not provide for

the possibility of other responsible parties consistent with the special verdict form; and (4) the Pardini jury's inconsistent findings about Alan's contributory negligence required resubmission of the case to the jury. Claiming the Pardini judgment should have been set aside due to those inconsistencies and ambiguities in the Pardini jury's verdict, Shega contends the trial court here erred in rejecting his "appellate" arguments based upon only "cursory review" of matters assertedly going to "the very heart of the judicial process." However, Shega has not demonstrated the Pardini judgment would have been reversed on appeal because of any asserted ambiguity or inconsistency in the Pardini jury's verdict.

First, the Pardini trial court had discretion whether to direct the jury to find a special verdict on all or any of the issues. (*Valentine v. Baxter Healthcare Corp.* (1999) 68 Cal.App.4th 1467, 1476; 7 Witkin, Cal.Procedure (1997) Trial, § 352, pp.399-400; see Code Civ. Proc., § 625.) Shega did not meet his burden to show that under the circumstances occurring during jury deliberations at the Pardini trial, the Pardini trial court abused its discretion by exceeding the bounds of reason in deciding to submit to the jury a general verdict form involving Kathy's claim rather than an amended special verdict form. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 331; *Denham v. Superior Court* (1970) 2 Cal.3d 557, 566; see *Fransen v. Washington* (1964) 229 Cal.App.2d 570, 574.)[14]

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[14] In *Fransen v. Washington, supra,* 229 Cal.App.2d 570, a case cited by Shega, the appellate court stated: "If the form of a verdict is defective the complaining party must object in the lower court, since the failure to so object results in a waiver of

Second, Shega did not show the Pardini jury was misled by the court-prepared general verdict form that was assertedly unduly suggestive of an outcome favoring Kathy by omitting mention of causation and negligence.[15] Similarly, Shega did not show any prejudicial error arising from the general verdict form's asserted defect in, unlike the special verdict form, omitting any provision for other person's possible responsibility. It is a "settled rule" that the general verdict implied a finding in favor of prevailing party Kathy "of every fact essential to the support" of her action. (*Henderson v. Harnischfeger Corp.* (1974) 12 Cal.3d 663, 673.) Further, "[a] verdict should be interpreted so as to uphold it and to give it the effect intended by the jury, as well as one consistent with the law and the evidence." (7 Witkin, Cal. Procedure, *supra*, Trial, § 375, p. 427.) "Accordingly, it is the rule that all reasonable inferences will be indulged in on appeal to support, rather than defeat, a jury's verdict and the judgment rendered thereon." (*Fransen v. Washington*, *supra*, 229 Cal.App.2d at p.574.) The Pardini jury was instructed on the elements of Kathy's consortium claim and her

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any defect of form." (*Id.* at p. 574; see Code Civ. Proc. § 619 [verdict may be corrected by jury under court's advice or jury may be sent out again]; 7 Witkin, Cal. Procedure, *supra*, Trial, §§ 380-381, 385, pp. 433-435, 438 [judge's power and duty to order correction; waiver of error by not requesting correction or clarification of verdict].)

[15] Such general verdict form provided:

"We, the jury in the above-captioned case, find in favor of the plaintiff Kathy Pardini and against the defendant John F. Shega and award damages in the sum of:

"Damages to Date: $___

"Future Damages: $___[.]"

recoverable damages. Absent any showing to the contrary, we must conclude the jury followed those instructions and, after considering the evidence, determined that Shega was negligent, Shega's negligence damaged Kathy, and Kathy was not contributorily negligent. (*Henderson v. Harnischfeger Corp., supra,* at p. 673; *Kurinij v. Hanna & Morton, supra,* 55 Cal.App.4th at p. 865; *Fransen v. Washington, supra,* at p.574; see Code Civ. Proc., § 475.)

Finally, as noted, the Pardini jury specially found Alan was negligent; Alan's negligence did not contribute as a legal cause to Alan's injury; and 10 percent of the total negligence proximately causing Alan's damages was Alan's contributory negligence. Shega's "Pardini appellate brief" asserted those inconsistent special jury findings about Alan's contributory negligence required that the Pardini trial court resubmit the case to the jury. However, the defect in the verdict was apparent at the time the verdict was rendered and could have been corrected. Since Shega did not ask the Pardini trial court to resubmit the case before the jury was discharged, Shega waived any appellate claim based on such defect. (*Henrioulle v. Marin Ventures, Inc.* (1978) 20 Cal.3d 512, 521-522; *Brown v. Regan* (1938) 10 Cal.2d 519, 523; *Jensen v. BMW of North America, Inc.* (1995) 35 Cal.App.4th 112, 131.) Moreover, in any event, Shega has not demonstrated the Pardini trial court's eventual correction of such defect in the verdict was erroneous. (*Woodcock v. Fontana Scaffolding & Equip. Co.* (1968) 69 Cal.2d 452, 456-457.)

(b)

Pardini Case Evidence on Shega's Reputation/Custom and Habit

Over Shega's objection, the Pardini trial court permitted Pardini to present evidence about Shega's assertedly poor reputation in the medical community and Shega's asserted custom/habit of falsifying medical records. Shega's "Pardini appellate brief" asserted the Pardini trial court should have excluded such evidence as (1) improper generalized evidence of bad character (Evid. Code, § 1101, subd. (a)); (2) unduly prejudicial (Evid. Code, § 352); and (3) lacking adequate foundation since not based on the witness's personal knowledge. Shega's "Pardini appellate brief" also asserted the Pardini trial court erred in not permitting Shega adequate time or opportunity to rebut such evidence.

Shega contends the trial court here improperly rejected his "Pardini appellate brief's" claim that the Pardini trial court erred in admitting evidence of Shega's reputation/custom and habit. However, Shega did not show that the Pardini trial court abused its discretion in admitting such evidence bearing on Shega's credibility. The testimony – given by a witness familiar with persons with whom Shega associated – that Shega had a "bad reputation" for "truthfulness, honesty, and integrity" was admissible under Evidence Code sections 780 and 1100. (*People v. Taylor* (1986) 180 Cal.App.3d 622, 629.) Further, at the Pardini trial Shega presented testimony of two rebuttal witnesses countering such reputation evidence. Moreover, since the accuracy of Shega's medical records involving his treatment of Pardini was at issue in the

Pardini case, the Pardini trial court properly admitted testimony by two Shega employees that Shega had a "habit and custom" and "routine" of falsifying medical records for various purposes. (Evid. Code, § 1105.) Such habit/custom evidence was controverted by rebuttal testimony introduced by Shega. Finally, Shega did not show that any asserted error with respect to evidence of reputation/custom and habit was prejudicial so as to require reversal of the Pardini judgment.

(c)

Pardini Case Evidence on Shega's Dermatology Specialty

The Pardini trial court admitted evidence that Shega's medical specialty was dermatology. Pardini's counsel argued to the jury that as a dermatologist Shega was not qualified to excise the squamous cell carcinoma from Pardini's tongue. The court also instructed the jury on a physician's duty to refer a patient to a specialist. (BAJI No. 6.04.) Shega's "Pardini appellate brief" asserted the court erred in admitting evidence suggesting Shega's certification as a dermatologist rendered him unqualified to treat Pardini. Shega's "Pardini appellate brief" also asserted that Pardini's argument to the jury was misleading and contrary to law by suggesting certification as a specialist restricted the permissible scope of Shega's areas of practice. Shega's "Pardini appellate brief" further asserted the cumulative effect of the improper evidence, argument and jury instruction was so prejudicial as to require reversal of the Pardini judgment.

Asserting the sole issue presented in the Pardini case was whether his treatment met the standard of care set

forth in BAJI Nos. 6.00.1 (duty of physician) and 6.01 (duty of specialist), Shega characterizes the "centerpiece" of Pardini's case as Pardini's argument that the procedure Shega performed on Pardini was outside the scope of Shega's practice. Shega thus contends the trial court here improperly rejected his "Pardini appellate brief's" claim that the Pardini trial court erred in admitting evidence of Shega's dermatology specialty. However, Shega did not show that the Pardini trial court abused its discretion in admitting such evidence. Indeed, Shega's "Pardini appellate brief" did not identify any objection made by Shega at the Pardini trial to admission of evidence of his specialty. Further, although indicating Shega's trial counsel interrupted Pardini's trial counsel's argument involving Shega's specialty to assert such argument misstated the law, the record of the Pardini trial reveals that Shega's counsel did not seek any ruling from the Pardini trial court involving such argument. In sum, Shega did not establish that the Pardini trial court committed any prejudicial error involving Shega's dermatology specialty.

(d)

Conclusion

After independently reviewing the record of relevant portions of the Pardini case, we conclude, as did the trial court here, that Shega's appeal of the Pardini judgment would have resulted in affirmance of such judgment with a $70,000 reduction of the amount of the award to Pardini.

C

Assertedly Improper Restrictions on Evidence on Shega's Claims Against Law Firm

Shega contends the trial court here improperly restricted evidence he proffered in support of his claims against Law Firm for legal malpractice and breach of fiduciary duty.

First, Shega asserts the trial court's "conclusive determination" that the Pardini judgment would not have been reversed on appeal unduly impacted the court's evidentiary rulings in this case. Specifically, Shega cites pretrial ruling that (1) Law Firm was not required to pursue the appeal of the Pardini judgment and (2) Law firm was not negligent in failing to preserve the record and/or waiving otherwise appropriate objections during the Pardini trial. However, the ruling that Law Firm need not pursue the Pardini case appeal reasonably followed from the court's proper conclusion such appeal would not have resulted in a reversal. Further, Shega's opening brief did not identify any specific proffered evidence assertedly excluded due to the court's pretrial rulings. Hence, Shega has not demonstrated any prejudicial error.

Shega also asserts the trial court erred in granting Law Firm's motion in limine to preclude evidence of the possible alcoholism of LDBB's Reynolds. Shega faults the court for denying his request for a foundational hearing on Reynolds's possible abuse of alcohol during the time of the Pardini trial. Shega claims his proffered evidence was relevant against Reynolds to prove malpractice and against LDBB to establish lack of supervision plus a duty to inform clients. However, Shega has not identified any

specific facts suggesting that alcoholism or intoxication on Reynolds's part had any causal connection with Law Firm's alleged malpractice or breach of fiduciary duty. Hence, on this record Shega has not established prejudicial error with respect to exclusion of evidence of Reynolds's possible alcoholism.

D

Assertedly Improper Restrictions on Shega's Damage Claims Against Law Firm

The trial court granted Law Firm's motion in limine to exclude evidence of Shega's asserted emotional distress resulting from Law Firm's legal malpractice and breach of fiduciary duty. The court instructed the jury that Shega was not entitled to recover mental/emotional distress damages from Law Firm. With respect to Law Firm, the special verdict forms permitted the jury to find economic damages only. The jury specially found Law Firm was negligent in not obtaining the $70,000 reduction of the amount of the Pardini judgment and such negligence caused Shega $2,847 economic damages. Further, the jury specially found Law Firm breached a fiduciary duty to Shega and such breach was a legal cause of damage to Shega but did not in fact cause Shega any economic damages.

Shega contends the trial court reversibly erred in not permitting him to seek noneconomic emotional distress damages on his claims against Law firm for legal malpractice and breach of fiduciary duty. As Shega acknowledges, emotional distress damages are generally not permitted in lawsuits for legal malpractice because the

primary interest protected in legal malpractice actions is economic and " . . . serious emotional distress is not an inevitable consequence of the loss of money. . . . " (*Merenda v. Superior Court* (1992) 3 Cal.App.4th 1, 10; accord *Smith v. Superior Court* (1992) 10 Cal.App.4th 1033, 1039; see *Camenisch v. Superior Court* (1996) 44 Cal.App.4th 1689, 1697-1698;[16] *Pleasant v. Celli* (1993) 18 Cal.App.4th 841, 853.) However, Shega contends Law Firm's legal malpractice contained the elements of intentional/affirmative misconduct or bad faith necessary to support an award of emotional distress damages. (*Smith v. Superior court, supra,* at p. 1040; *Quezada v. Hart* (1977) 67 Cal.App.3d 754, 761.) Specifically, Shega cites (1) Law Firm's settling the Pardini case without Shega's consent contrary to California law (§ 801, former subd. (d)), Shega's insurance contract with SCPIE and Shega's specific directions; (2) Law Firm's doing so with knowledge

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[16] "*Merenda v. Superior Court, supra,* established the rule that emotional distress damages are not generally recoverable in cases of attorney malpractice related to litigation. [Citation.] Public policy reasons do not support a different result when the alleged malpractice is committed in a tax advice context, even if the tax advice is part of an estate plan. [¶] As in a litigation context, the client's primary protected interest is economic in a tax planning situation. The prospect of paying taxes is generally considered distressing, and the prospect of paying a greater levy than necessary is even more disquieting. However, the emotional upset derives from a inherently economic concern. [¶] Everything the *Merenda* court said about litigation malpractice applies with equal force to failed tax avoidance. Just as the risk of losing is inherent in every lawsuit, the potential for failure is inherent in every attempt to avoid taxes. Litigation is stressful, but so is paying taxes or anticipating their payment." (*Camenisch v. Superior Court, supra,* 44 Cal.App.4th at p. 1697.)

that Shega's assertedly substantial appeal rights in the Pardini case would be forfeited; (3) Law Firm's assertedly violating ethical and legal obligations owed to client Shega with respect to the Pardini settlement negotiations and ultimate settlement; and (4) Law Firm's ignoring the asserted conflict of interest with respect to continuing to represent both Shega and SCPIE.

However, as Shega acknowledges in his appellate briefs here, by time of trial Shega's legal malpractice claims against Law Firm were limited to (1) Law Firm's asserted negligence in the Pardini case in not raising a statute of limitations defense to Pardini's wife's claim; (2) Law Firm's asserted negligence in the Pardini case in failing to call Drs. Campbell and Hansen as witnesses; and (3) Law Firm's asserted negligence in not obtaining a $70,000 reduction in the amount of the Pardini judgment. Since the trial court had properly ruled that Law Firm was not required to pursue Shega's appeal of the Pardini judgment because as a matter of law the Pardini judgment would not have be [sic] reversed on appeal, Law Firm's settlement-related conduct asserted by Shega as constituting grounds for emotional distress damages was no longer part of Shega's legal malpractice claim against Law Firm at trial. Further, the remaining controverted claims of legal malpractice based on the statute of limitations, uncalled witnesses and failure to reduce the amount of the award were insufficient to support noneconomic emotional distress damages since such claims simply implicated Shega's economic interests.[17] (*Camenisch v.*

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[17] We note the jury specially rejected Shega's legal malpractice claim involving the statute of limitations and was

Superior Court, supra, 44 Cal.App.4th at pp. 1697-1698; *Pleasant v. Celli, supra,* 18 Cal.App.4th at p. 853;[18] *Smith v. Superior Court, supra,* 10 Cal.App.4th at p. 1039; *Merenda v. Superior Court, supra,* 3 Cal.App.4th at pp. 6, 10.) Moreover, as based on the same asserted misconduct by Law Firm implicating only Shega's economic interests, Shega's claim for breach of fiduciary duty against Law Firm was similarly insufficient to support an award of noneconomic emotional distress damages.[19]

In sum, on this record the trial court properly precluded Shega from seeking noneconomic emotional distress damages from Law Firm.

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unable to reach a verdict on Shega's legal malpractice claim involving the failure to call Drs. Campbell and Hansen as witnesses.

[18] In *Pleasant v. Celli, supra,* 18 Cal.App.4th 841, the appellate court observed: "Generally, the only foreseeable impact on the plaintiff from an attorney's wrongdoing is an economic loss. It is foreseeable that the plaintiff would be annoyed and inconvenienced by the attorney's failure, for example, to file suit within the applicable statute of limitations. However, the disappointment one might feel upon learning that counsel has missed a filing deadline falls for short of the shock, fright, mortification, humiliation, grief, anxiety or nervousness which characterize the cases imposing liability for negligent infliction of emotional distress." (*Id.* at p. 853.) Thus, in reversing an award of emotional distress damages in a legal malpractice action, the appellate court rejected a contention similar to Shega's by concluding the plaintiff's " . . . personal feelings of betrayal by doctors and lawyers simply do not amount to a claim of highly foreseeable shock stemming from an abnormal event." (*Ibid.*)

[19] Indeed, an award of damages for emotional distress would have been anomalous in light of the jury's special finding that Law Firm's breach of fiduciary duty did not even damage Shega economically.

E

Law Firm's Argument to Jury that Shega Suffered No Economic Damages

Shega contends the trial court erred in permitting Law Firm to argue to the jury that because the Pardini case was settled within policy limits Shega did not suffer any economic damages as the result of Law Firm's negligence or breach of fiduciary duty. Specifically, Shega contends the court assertedly made an improper determination that the collateral source rule did not apply in this case.[20]

However, Shega has not identified anything in the record indicating the trial court made any ruling involving the collateral source rule.[21] Similarly, Shega has not

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[20] The collateral source rule is " . . . the doctrine that if an injured party receives some compensation for his injuries from a source wholly independent of the tortfeasor, such payment should not be deducted from the damages which the plaintiff would otherwise collect from the tortfeasor." (*Helfend v. Southern Cal. Rapid Transit Dist.* (1970) 2 Cal.3d 1, 6; *Kirtland & Packard v. Superior Court* (1976) 59 Cal.App.3d 140, 145.) The collateral source rule precludes the defendant from mitigating damages by showing the plaintiff has received compensation for some of its injuries from a source wholly independent of the tortfeasor. (*Acosta v. Southern Cal. Rapid Transit Dist.* (1970) 2 Cal.3d 19, 26-27.)

[21] Instead, Shega simply cites a colloquy between the trial court and Shega's counsel:

The Court: "I think I understand the collateral source rule. Now, you're not suggesting, or are you, that the $450,000, which was more than that, paid to Dr. Pardini would be collected as damages by Dr. Shega if the jury finds that there would have been a defense verdict in the underlying case?"

shown he objected at trial to the challenged portion of Law Firm's argument to the jury. Hence, Shega has not demonstrated prejudicial error with respect to such argument. Moreover, in any event, we note that in *Kirtland & Packard v. Superior Court, supra,* 59 Cal.App.3d 140, the appellate court stated: "We know of no case applying the collateral source rule to a situation in which the injury sustained by the injured person was an award against him in an unrelated lawsuit of damages which he personally was never called on to pay." (*Id.* at p. 145.) Further, in testifying at trial about his damages, Shega did not include either the $70,000 amount by which the Pardini judgment should have been reduced, the entire amount of the Pardini judgment, or the Pardini settlement amount.

F

Asserted Defects in Instruction and Special Verdict Form on Burden of Proof

The trial court instructed the jury: "In order to recover damages from an attorney for negligence in the

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Shega's counsel: "What I am saying is that is a factor of theirs to consider in damages. Am I going to go up and say that because you, you – we've proved that Dr. Shega should have received a defense verdict, they paid $450,000, you should give us $450,000?"

The court: "Yeah."

Shega's counsel: "No. What I'm going to say, or what I believe the jury should consider, is that that $450,000 that was paid and reported to the databank, reported to the medical board, et cetera, is a factor to consider in whatever number they come to, the fact that there was a judgment which is entered in the public record of $373,000, whatever it is."

handling of a lawsuit, the Plaintiff must not only establish that the attorney was negligent but also must establish that but for such negligence the prior lawsuit would have been successfully defended." The special verdict form contained a question asking if Shega would have "won" the Pardini case if Drs. Campbell and Hansen had been called as witnesses. The jury did not reach agreement on that question but instead voted seven yes and five no. Shega contends such instruction and special verdict form improperly required the jury to find that Shega would have won the Pardini case.

Asserting he was not legally required to prove Law Firm's negligence caused Shega to lose the Pardini case, Shega contends instead he needed only prove that but for Law firm's negligence Shega would have received a better result in the Pardini case. (*Stanley v. Richmond* (1995) 35 Cal.App.4th 1070, 1075; *Travelers Ins. Co. v. Lesher* (1986) 187 Cal.App.3d 169, 197, disapproved on another point in *Buss v. Superior Court* (1997) 16 Cal.4th 35, 50, fn. 12.) In his opening brief here, Shega characterizes possible "results" in the Pardini case as (1) a finding of no negligence; (2) a finding of no causation; (3) an award of minimal damages; (4) reversal and remand on appeal; and (5) a settlement reflecting the merits of Shega's position. However, on this record Shega has not demonstrated prejudicial error with respect to the challenged instruction or special verdict form.

A finding of no negligence or no causation would have been tantamount to a finding Shega would have won the Pardini case. Further, as Shega acknowledges, by time of trial Shega's claims against Law Firm did not include Law Firm's conduct involving the appeal or the

settlement. Hence, the only remaining question is whether the award of damages against Shega in the Pardini case would have been "minimal" if Law Firm had called Drs. Campbell and Hansen to testify at the Pardini trial. However, by not identifying the substance of those potential witnesses' testimony, Shega has not met his burden to show the answer to such remaining inquiry was yes. Accordingly, Shega has not established error or prejudice with respect to the instruction or special verdict form bearing on burden of proof.

G

Asserted Defect in Special Verdict Form on Punitive Damages

Finally, Shega contends the trial court prejudicially erred in submitting special verdict forms effectively instructing the jury to skip the punitive damage issue even if it found Law Firm was liable for legal malpractice and breached its fiduciary duty to Shega.[22] Specifically,

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[22] The trial court submitted to the jury two special verdict forms involving Shega's claims against Law Firm.

Responding to special verdict form No. 1's question whether Shega would have won the Pardini case if Drs. Campbell and Hansen had been called as witnesses in such case, the jury stated it was "[h]ung." Responding to special verdict form No. 1's question whether Pardini's wife's loss of consortium claim in the Pardini case was time-barred by the statute of limitations, the jury said no. Later, the jury answered yes to special verdict form No. 1's questions whether Law Firm breached a fiduciary duty to Shega and, if so, whether such breach of fiduciary duty was a legal cause of damages to Shega. However, the jury then answered zero to special verdict form

Shega contends that by assertedly burying the punitive damage inquiry as the final question in special verdict form No. 1 and instructing the jury to skip such question although it had found that Law Firm breached its fiduciary duty to Shega, the court deprived the jury of the opportunity to consider the issue of punitive damages based on Law Firm's malpractice in not obtaining reduction of the Pardini judgment. Shega also contends the assertedly faulty special verdict forms were prejudicial because punitive damages may properly be awarded in a legal malpractice action upon proof of fraud oppression or malice.

However, Shega has not identified any evidence in the record that would support a finding of fraud, oppression or malice with respect to Law Firm's failure to secure a $70,000 reduction of the award in the Pardini case. Further, since the jury found Law Firm's breach of fiduciary duty did not cause Shega any economic damages, Shega was not entitled to punitive damages based upon

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No. 1's question asking the total amount of economic damages suffered by Shega and caused by Law firm's conduct. Thus, as directed by special verdict form No. 1, the jury did not reach special verdict form No. 1's question whether Law Firm acted toward Shega with fraud, oppression or malice.

The jury then responded yes to special verdict form No. 1B's questions whether Law Firm was negligent in regard to the reduction of damages found in the Pardini case and whether such negligence was a legal cause of damage to Shega. Responding to special verdict form No. 1B's question asking the total amount of economic damages suffered by Shega and caused by Law Firm's conduct, the jury stated $2,847. The jury then proceeded to answer no to special verdict form No. 1B's question whether Shega failed to mitigate his damage.

such breach. Thus, on this record Shega has not demonstrated any prejudicial error with respect to the special verdict forms' treatment of punitive damages.

H

Conclusion on Shega's Appeal

In sum, Shega has not shown the existence of any judicial error prejudicing him with respect to his first amended complaint against Law Firm.

IV

LAW FIRM'S APPEAL

Law Firm approved the proposed judgment prepared by Pardini but did not reduce the verdict against Shega by $70,000 as required by Civil Code sections 1431.2 and 3333.2, subdivision (b). The jury awarded Shega $2,847 economic damages for Law Firm's legal malpractice in not obtaining a $70,000 reduction in the amount of the Pardini judgment. Law firm contends the judgment favoring Shega against Law Firm must be reversed because there was assertedly no evidence to support the damage award of $2,847. Specifically, Law Firm attacks the economic damage award to Shega as unsupported by any specific evidence that Law Firm's failure to obtain the $70,000 reduction damaged Shega in the amount of $2,847. Agreeing with Law Firm, we conclude the economic damage award to Shega for Law Firm's negligence was not supported by substantial evidence.

Shega incurred $1,769 attorney fees associated with the Medical Board investigation and $1,078 attorney fees relating to his attempt to correct Data Bank's records. The sum of those attorney fee amounts was $2,847, precisely the damages awarded by the jury. This record may reasonably be interpreted only as indicating the jury reached its $2,847 damage award by adding together the two attorney fee amounts. However, there was no evidence those attorney fees were attributable specifically to the issue of the $70,000 reduction of the Pardini judgment rather than to matters involving the entirety of such judgment. Similarly, there was also no evidence that those attorney fee amounts would have been less but for Law Firm's alleged negligence in not obtaining the $70,000 reduction. "Uncertainty as to the *fact* of whether any damages were sustained at all is fatal to recovery. . . ." (*Fisher v. Hampton* (1975) 44 Cal.App.3d 741, 748.) Thus, as devoid of substantial evidentiary support, the damage award to Shega against Law Firm must be reversed.

Finally, Law Firm attacks the superior court's post-trial award of $15,281.80 costs to Shega for proving facts denied by Law Firm during discovery and as the prevailing party at trial. (Code Civ. Proc., §§ 1032, subd. (b), 2033, subd. (*o*).) In light of our conclusion the entirety of the damage award to Shega must be reversed as unsupported by substantial evidence, the award of costs must also be reversed, a point not contested by Shega. (*Mount Olympus Property Owners Assn. v. Shpirt* (1997) 59 Cal.App.4th 885, 893, fn. 7.)

In sum, on this record the portion of the judgment favoring Shega against Law Firm must be reversed and a new judgment entered in favor of Law Firm.

V

DISPOSITION

The portion of the judgment favoring Shega against Southern California Physicians Insurance Exchange (SCPIE) and Gogo on Shega's second amended complaint is reversed with directions to the superior court to enter judgment favoring SCPIE and Gogo.

The portion of the judgment favoring Shega on SCPIE's cross-complaint is affirmed.

The portion of the judgment favoring Shega against Lewis, D'Amato, Brisbois & Bisgaard LLP and Reynolds (together Law Firm) is reversed with directions to the superior court to enter judgment favoring Law Firm against Shega. The matter is remanded to the superior court to consider an award of costs to Law Firm against Shega.

The motion filed by Law Firm to dismiss Shega's appeal is denied.

Law Firm is awarded costs on appeal against Shega. With respect to the claims among Shega, SCPIE and Gogo, the parties shall bear their own costs on appeal.

/s/ Kremer, P.J.
KREMER, P.J.

WE CONCUR:

/s/ Huffman
HUFFMAN, J.

/s/ McDonald
McDONALD, J.

COURT OF APPEAL – STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

Division One

San Diego County Superior Court
P.O. Box 2724
San Diego, CA 92112

RE: SHEGA, JOHN F.
Plaintiff-Respondent-Appellant

v.

LEWIS D'AMATO BRISBOIS & BISGAARD
Defendant-Respondent-X/Appellant
SOUTHERN CALIFORNIA PHYSICIANS EXCHANGE
Defendant-Appellant-Respondent
D029700
San Diego County No. 666185*

***** REMITTITUR *****

I, Stephen M. Kelly, Clerk of the Court of Appeal of the State of California, for the Fourth Appellate District, certify the attached is a true and correct copy of the original opinion or decision entered in the above-entitled case on June 19, 2000, and that this opinion or decision has now become final.

____ Appellant ___ Respondent to recover costs.

____ Each party to bear own costs.

____ Costs are not awarded in this proceeding.

_✓_ Other (See Below)

Law Firm is awarded costs on appeal against Shega. With respect to teh [sic] claims among Shega, SCPIE, and Gogo, the parties shall bear their own costs own [sic] appeal.

Witness my hand and the seal of the Court affixed this October 3, 2000.

(SEAL)

STEPHEN M. KELLY, Clerk

By: Felix Quenga
Deputy Clerk

cc: All parties (Copy of remittitur only, Cal. Rules of Court, rule 25(e))

Court of Appeal, Fourth Appellate District,
Division One – No. D029700
S090229

IN THE SUPREME COURT OF CALIFORNIA

En Banc

JOHN F. SHEGA,
Plaintiff, Cross-defendant and Respondent,

v.

LEWIS, D'AMATO, BRISBOIS & BISGAARD LLP,
Defendant and Appellant; SOUTHERN CALIFORNIA
PHYSICIANS INSURANCE EXCHANGE,
Defendant, Cross-complainant and Appellant.

(Filed Sept. 27, 2000)

Petition for review DENIED.

The request for an order directing publication of the opinion is denied.

GEORGE
Chief Justice

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42 U.S.C. § 11101. Findings

The Congress finds the following:

(1) The increasing occurrence of medical malpractice and the need to improve the quality of medical care have become nationwide problems that warrant greater efforts than those that can be undertaken by any individual State.

(2) There is a national need to restrict the ability of incompetent physicians to move from State to State without disclosure or discovery of the physician's previous damaging or incompetent performance.

(3) This nationwide problem can be remedied through effective professional peer review.

(4) The threat of private money damage liability under Federal laws, including treble damage liability under Federal antitrust law, unreasonably discourages physicians from participating in effective professional peer review.

(5) There is an overriding national need to provide incentive and protection for physicians engaging in effective professional peer review.

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42 U.S.C. § 11111. Professional review

(a) In general

(1) Limitation on damages for professional review actions. If a professional review action (as defined in

section 431(9) [*42 USCS § 11151* (9)]) of a professional review body meets all the standards specified in section 412(a) [*42 USCS § 11112* (a)], except as provided in subsection (b) –

(A) the professional review body,

(B) any person acting as a member or staff to the body,

(C) any person under a contract or other formal agreement with the body, and

(D) any person who participates with or assists the body with respect to the action, shall not be liable in damages under any law of the United States or of any State (or political subdivision thereof) with respect to the action. The preceding sentence shall not apply to damages under any law of the United States or any State relating to the civil rights of any person or persons, including the Civil Rights Act of 1964, *42 U.S.C. 2000e*, et seq. and the Civil Rights Acts, *42 U.S.C. 1981*, et seq. Nothing in this paragraph shall prevent the United States or any Attorney General of a State from bringing an action, including an action under section 4C of the Clayton Act, *15 U.S.C. 15C*, [*15 USCS § 15c*] where such an action is otherwise authorized.

(2) Protection for those providing information to professional review bodies. Notwithstanding any other provision of law, no person (whether as a witness or otherwise) providing information to a professional review body regarding the competence or professional conduct of a physician shall be held, by reason of having provided such information, to be liable in damages under

any law of the United States or of any State (or political subdivision thereof) unless such information is false and the person providing it knew that such information was false.

(b) Exception. If the Secretary has reason to believe that a health care entity has failed to report information in accordance with section 423(a) [*42 USCS § 11133* (a)], the Secretary shall conduct an investigation. If, after providing notice of noncompliance, an opportunity to correct the noncompliance, and an opportunity for a hearing, the Secretary determines that a health care entity has failed substantially to report information in accordance with section 423 (a) [*42 USCS § 11133* (a)], the Secretary shall publish the name of the entity in the Federal Register. The protections of subsection (a) (1) shall not apply to an entity the name of which is published in the Federal Register under the previous sentence with respect to professional review actions of the entity commenced during the 3-year period beginning 30 days after the date of publication of the name.

(c) Treatment under State laws.

(1) Professional review actions taken on or after October 14, 1989. Except as provided in paragraph (2), subsection (a) shall apply to State laws in a State only for professional review actions commenced on or after October 14, 1989.

(2) Exceptions.

(A) State early opt-in. Subsection (a) shall apply to State laws in a State for actions commenced before

October 14, 1989, if the State by legislation elects such treatment.

(B) Effective date of election. An election under State law is not effective, for purposes of [subparagraph (A)], for actions commenced before the effective date of the State law, which may not be earlier than the date of the enactment of that law.

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42 U.S.C. § 11137. Miscellaneous provisions

(a) Providing licensing boards and other health care entities with access to information. The Secretary (or the agency designated under section 424(b) [*42 USCS § 11134* (b)]) shall, upon request, provide information reported under this part with respect to a physician or other licensed health care practitioner to State licensing boards, to hospitals, and to other health care entities (including health maintenance organizations) that have entered (or may be entering) into an employment or affiliation relationship with the physician or practitioner or to which the physician or practitioner has applied for clinical privileges or appointment to the medical staff.

(b) Confidentiality of information.

(1) In general. Information reported under this part [*42 USCS §§ 11131* et seq.] is considered confidential and shall not be disclosed (other than to the physician or practitioner involved) except with respect to professional review activity, as necessary to carry out subsections (b) and (c) of section 425 [*42 USCS § 11135* (b), (c)] (as

specified in regulations by the Secretary), or in accordance with regulations of the Secretary promulgated pursuant to subsection (a). Nothing in this subsection shall prevent the disclosure of such information by a party which is otherwise authorized, under applicable State law, to make such disclosure. Information reported under this part [*42 USCS §§ 11131* et seq.] that is in a form that does not permit the identification of any particular health care entity, physician, other health care practitioner, or patient shall not be considered confidential. The Secretary (or the agency designated under section 424(b) [*42 USCS § 11134* (b)], on application by any person, shall prepare such information in such form and shall disclose such information in such form.

(2) Penalty for violations. Any person who violates paragraph (1) shall be subject to a civil money penalty of not more than $10,000 for each such violation involved. Such penalty shall be imposed and collected in the same manner as civil money penalty of not more than $10,000 for each such violation involved. Such penalty shall be imposed and collected in the same manner as civil money penalties under subsection (a) of section 1128A of the Social Security Act [*42 USCS § 1320a-7a*] are imposed and collected under that section.

(3) Use of information. Subject to paragraph (1), information provided under section 425 [*42 USCS § 11135*] and subsection (a) is intended to be used solely with respect to activities in the furtherance of the quality of health care.

(4) Fees. The Secretary may establish or approve reasonable fees for the disclosure of information under

this section or section 426 [*42 USCS § 11136*]. The amount of such a fee may not exceed the costs of processing the requests for disclosure and of providing such information. Such fees shall be available to the Secretary (or, in the Secretary's discretion, to the agency designated under section 424(b) [*42 USCS § 11134* (b)]) to cover such costs.

(c) Relief from liability for reporting. No person or entity (including the agency designated under section 424(b) [*42 USCS § 11134* (b)]) shall be held liable in any civil action with respect to any report made under this part [*42 USCS §§ 11131* et seq.] (including information provided under subsection (a) [)] without knowledge of the falsity of the information contained in the report.

(d) Interpretation of information. In interpreting information reported under this part [*42 USCS §§ 11131* et seq.], a payment in settlement of a medical malpractice action or claim shall not be construed as creating a presumption that medical malpractice has occurred.

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10 U.S.C. § 1102. Confidentiality of medical quality assurance records: qualified immunity for participants

(a) Confidentiality of Records. Medical quality assurance records created by or for the Department of Defense as part of a medical quality assurance program are confidential and privileged. Such records may not be disclosed to any person or entity, except as provided in subsection (c).

(b) Prohibition on Disclosure and Testimony.

(1) No part of any medical quality assurance record described in subsection (a) may be subject to discovery or admitted into evidence in any judicial or administrative proceeding, except as provided in subsection (c).

(2) A person who reviews or creates medical quality assurance records for the Department of Defense or who participates in any proceeding that reviews or creates such records may not be permitted or required to testify in any judicial or administrative proceeding with respect to such records or with respect to any finding, recommendation, evaluation, opinion, or action taken by such person or body in connection with such records except as provided in this section.

(c) Authorized Disclosure and Testimony.

(1) Subject to paragraph (2), a medical quality assurance record described in subsection (a) may be disclosed, and a person referred to in subsection (b) may give testimony in connection with such a record, only as follows:

(A) To a Federal executive agency or private organization, if such medical quality assurance record or testimony is needed by such agency or organization to perform licensing or accreditation functions related to Department of Defense health care facilities or to perform monitoring, required by law, of Department of Defense health care facilities.

(B) To an administrative or judicial proceeding commenced by a present or former Department of Defense health care provider concerning the termination,

suspension, or limitation of clinical privileges of such health care provider.

(C) To a governmental board or agency or to a professional health care society or organization, if such medical quality assurance record or testimony is needed by such board, agency, society, or organization to perform licensing, credentialing, or the monitoring of professional standards with respect to any health care provider who is or was a member or an employee of the Department of Defense.

(D) To a hospital, medical center, or other institution that provides health care services, if such medical quality assurance record or testimony is needed by such institution to assess the professional qualifications of any health care provider who is or was a member or employee of the Department of Defense and who has applied for or been granted authority or employment to provide health care services in or on behalf of such institution.

(E) To an officer, employee, or contractor of the Department of Defense who has a need for such record or testimony to perform official duties.

(F) To a criminal or civil law enforcement agency or instrumentality charged under applicable law with the protection of the public health or safety, if a qualified representative of such agency or instrumentality makes a written request that such record or testimony be provided for a purpose authorized by law.

(G) In an administrative or judicial proceeding commenced by a criminal or civil law enforcement

agency or instrumentality referred to in subparagraph (F), but only with respect to the subject of such proceeding.

(2) With the exception of the subject of a quality assurance action, the identity of any person receiving health care services from the Department of Defense or the identity of any other person associated with such department for purposes of a medical quality assurance program that is disclosed in a medical quality assurance record described in subsection (a) shall be deleted from that record or document before any disclosure of such record is made outside the Department of Defense. Such requirement does not apply to the release of information pursuant to section 552a of title 5.

(d) Disclosure for Certain Purposes.

(1) Nothing in this section shall be construed as authorizing or requiring the withholding from any person or entity aggregate statistical information regarding the results of Department of Defense medical quality assurance programs.

(2) Nothing in this section shall be construed as authority to withhold any medical quality assurance record from a committee of either House of Congress, any joint committee of Congress, or the General Accounting Office if such record pertains to any matter within their respective jurisdictions.

(e) Prohibition on Disclosure of Record or Testimony. A person or entity having possession of or access to a record or testimony described by this section may not disclose the contents of such record or testimony in any

manner or for any purpose except as provided in this section.

(f) Exemption From Freedom of Information Act. Medical quality assurance records described in subsection (a) may not be made available to any person under section 552 of title 5.

(g) Limitation on Civil Liability. A person who participates in or provides information to a person or body that reviews or creates medical quality assurance records described in subsection (a) shall not be civilly liable for such participation or for providing such information if the participation or provision of information was in good faith based on prevailing professional standards at the time the medical quality assurance program activity took place.

(h) Application to information in certain other records. Nothing in this section shall be construed as limiting access to the information in a record created and maintained outside a medical quality assurance program, including a patient's medical records, on the grounds that the information was presented during meetings of a review body that are part of a medical quality assurance program.

(i) Regulations. The Secretary of Defense shall prescribe regulations to implement this section.

(j) Definitions. In this section:

(1) The term "medical quality assurance program" means any activity carried out before, on, or after November 14, 1986 by or for the Department of Defense to assess the quality of medical care, including activities

conducted by individuals, military medical or dental treatment facility committees, or other review bodies responsible for quality assurance, credentials, infection control, patient care assessment (including treatment procedures, blood, drugs, and therapeutics), medical records, health resources management review and identification and prevention of medical or dental incidents and risks.

(2) The term "medical quality assurance record" means the proceedings, records, minutes, and reports that emanate from quality assurance program activities described in paragraph (1) and are produced or compiled by the Department of Defense as part of a medical quality assurance program.

(3) The term "health care provider" means any military or civilian health care professional who, under regulations of a military department, is granted clinical practice privileges to provide health care services in a military medical or dental treatment facility or who is licensed or certified to perform health care services by a governmental board or agency or professional health care society or organization.

(k) Penalty. Any person who willfully discloses a medical quality assurance record other than as provided in this section, knowing that such record is a medical quality assurance record, shall be fined not more than $3,000 in the case of a first offense and not more than $20,000 in the case of a subsequent offense.